TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 126.

MARTHA S. MUNSEY, PLAINTIFF IN ERROR,

vs.

M. SWAIN CLOUGH, SHERIFF OF MERRIMACK COUNTY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE.

FILED OCTOBER 14, 1904.

(19,091.)

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INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	2
Caption	3	2
Petition for writ of *habeas corpus*	4	2
Writ of *habeas corpus*	6	3
Sheriff's return	6	4
Warrant of arrest	7	4
Motion for discharge	9	5
Findings of fact	11	6
Sheriff's return	11	6
Indictment	11	7
Affidavit that relator is fugitive from justice	15	10
Certificate of district attorney	16	10
Motion to discharge	17	11
Order denying motion to discharge	17	12
Opinion of supreme court of New Hampshire, December 27, 1902	19	12
Order of supreme court of New Hampshire, January 28, 1903	32	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 10, 1904.

	Original.	Print
Further findings of fact	34	23
Petition in part	34	23
Preamble to requisition	35	24
Certificate of district attorney	36	25
Certificate of clerk of superior court, Massachusetts	38	26
Opinion of supreme court of New Hampshire, June 2, 1903	42	28
Order of supreme court of New Hampshire, July 3, 1903	46	30
Objections to judgment	48	31
Judgment	50	32
Motion for stay	51	32
Petition for writ of error	53	33
Order allowing writ of error	61	39
Bond on writ of error	63	39
Clerk's certificate	64	40
Citation	66	41
Proof of service of citation	67	41

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the superior court of the State of New Hampshire, holden at Concord, within and for the county of Merrimack, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of New Hampshire in which a decision could be had in the writ of *habeas corpus* between Martha S. Munsey, of Pittsfield in said county of Merrimack, plaintiff and M. Swain Clough, sheriff of said Concord, defendant, in a *habeas corpus* proceeding wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Martha S. Munsey as by her complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom- of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 8th day of September, in the year of our Lord one thousand nine hundred and three.

BURNS P. HODGMAN,
Clerk of the Circuit Court of the United States,
District of New Hampshire.

Allowed by
ROBERT M. WALLACE,
Chief Justice of the Superior Court of the
State of New Hampshire.

2 [Endorsed:] Martha S. Munsey *vs.* M. Swain Clough Writ of error Filed this 8th day of September 1903 A. J. Shurtleff clerk superior court

STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss.*:

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I A. J. Shurtleff clerk of said superior court have hereto set my hand and the seal of said court this sixth day of October A. D. 1903.

[Seal Superior Court, New Hampshire.]

A. J. SHURTLEFF, *Clerk*.

3 STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss.*:

At the superior court holden at Concord within and for the county of Merrimack aforesaid, on the first Tuesday of April in the year of our Lord one thousand nine hundred and three.

4 To Honorable Charles F. Stone, justice of the superior court:

Respectfully represents your petitioner, Martha S. Munsey that she is at Concord, in our county of Merrimack, illegally restrained of her liberty by M. Swain Clough, sheriff of the county of Merrimack who claims to hold your petitioner by virtue of an arrest made in pursuance of an executive warrant issued by the governor of the State of New Hampshire on a requisition from the governor of Massachusetts, reciting that your petitioner stands charged by indictment in said latter State with the crime of uttering forged wills committed in the county of Middlesex on the 28th day of February A. D. 1895; on the 17th day of May A. D. 1895, and on the 20th day of November A. D. 1901 and was a fugitive from the justice of the latter State.

Your petitioner avers that she is illegally restrained of her liberty because the proceedings and process upon which the executive warrant was issued by the governor of the State of New Hampshire are irregular and defective and the evidence filed in support thereof is insufficient the documentary evidence contradictory and, assuming all the evidence to be true, is not sufficient to warrant the extradition of your petitioner.

Second. That upon the proceedings filed in the application to the governor upon which the warrant was issued, it appears, and upon evidence to be submitted to the court in a hearing upon the writ of *habeas corpos* prayed for in this petition, it will also conclusively appear that your petitioner is not a "fugitive from justice" within the meaning of that term as used in the Constitution and the acts of Congress relating thereto.

Third. That your petitioner is not a "fugitive from justice."

Fourth. Because the governor of the State of New Hampshire upon the hearing on the application for the issue of said executive warrant, declined and refused to hear or consider any evidence from your petitioner, or in behalf of your petitioner, upon the question of whether she was a "fugitive from justice" or upon any other question, and ruled that the only evidence which he would consider and upon which he based the issuance of said warrant was the documentary evidence offered and filed in support of the requisition made by the governor of Massachusetts.

Fifth. Because the only evidence considered by the governor of the State of New Hampshire, upon which he issued the warrant on the aforesaid requisition was documentary evidence filed in support of the requisition of the governor of the Commonwealth of Massachusetts and because he refused and declined to hear any evidence, either documentary or oral offered in behalf of your petitioner.

Wherefore your petitioner prays for a writ of *habeas corpus* and that the same may issue to said M. Swain Clough ordering him to have the body of your petitioner before your honor that she may be released from restraint and granted her liberty, and for such other relief as may be just.

MARTHA S. MUNSEY.

MERRIMACK, *ss*:

MARCH 5, A. D. 1902.

Subscribed and sworn to before me,

EDWARD A. LANE,
Justice of the Peace.

[L. S.]

STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss*:

To M. Swain Clough, sheriff of Merrimack county:

We command you that the body of Martha S. Munsey by you imprisoned and restrained of her liberty, as is said together with the day and causes of taking and detaining of the said Martha S. Munsey by whatever name the said Munsey may be called you have before me Charles F. Stone justice of the supreme court at the office of Sargent, Niles & Morrill No. 60 No. Main St. in Concord in said county, on Saturday the 15th day of February A. D. 1902 at ten

o'clock in the forenoon to undergo and receive what shall by me then and there be considered of her in this behalf; and have you then and there this writ.

Witness my hand and seal at Concord, N. H. this eighth day of March in the year nineteen hundred and two.

CHARLES F. STONE,
Associate Justice of the Superior Court.

STATE OF NEW HAMPSHIRE, *Merrimack,* } *ss.:*

MAR. 15, 1902.

To Mr. Justice Stone:

I have here in court the within named Martha S. Munsey, who is now in my custody under a warrant from the governor of New Hampshire on the requisition of the governor of Massachusetts to arrest said Martha S. Munsey & deliver her to Jophanus H. Whitney, as the duly authorized agent of the Commonwealth of Massachusetts; and she has so been in my custody since March 4, 1902, when I received said warrant, a copy of which is hereto annexed.

M. SWAIN CLOUGH, *Sheriff.*

MERRIMACK, *ss.:*

APR. 15, 1902.

Subscribed and sworn to before me

JOHN M. MITCHELL,
Justice of the Peace.

7 STATE OF NEW HAMPSHIRE:

[L. S.] Chester B. Jordan, governor.

The governor of the State of New Hampshire to M. Swain Clough and the sheriffs, under sheriffs, and other officers of and in the several cities and counties of this State:

Whereas, it has been represented to me by the acting governor of the Commonwealth of Massachusetts that Martha S Munsey stand-charged with the crime of uttering forged wills which he certifies to be a crime under the laws of said Commonwealth committed in the county of Middlesex in said Commonwealth, and that she has fled from justice in said Commonwealth and has taken refuge in the State of New Hampshire, and the said governor of Massachusetts having, in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said Martha S. Munsey to be arrested and delivered to Jophanus H. Whitney who is duly authorized to receive her into his custody and convey her back to the said — of Massachusetts.

And whereas, the said representation and demand is accompanied by certified copy of an indictment whereby the said Martha S. Munsey — shown to have been duly charged with the said crime and with having fled from said Commonwealth and taken refuge in the State of New Hampshire, which is duly certified by the said acting governor of Massachusetts to be authentic and duly authenticated.

Wherefore, you are required to arrest and secure the said Martha S. Munsey wherever she may be found within the State and afford her such opportunity to sue out a writ of *habeas corpus* as is prescribed by the laws of this State, and to thereafter deliver into the custody of the said Jophanus H. Whitney to be taken back to the said Commonwealth from which she fled, pursuant to the said requisition; and also to return this warrant and make return to the governor of New Hampshire, within thirty days from the date hereof, of all your proceedings had thereunder and of all facts and circumstances relating thereto.

Given under my hand and the seal of the State, at the capitol,
8 in Concord, this 4th day of March in the year of our Lord one thousand nine hundred and two.

By the governor:

EDWARD N. PEARSON,
Secretary of State.

9 STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss.*

To the Honorable Charles F. Stone, associate justice of the superior court:

In re MARTHA S. MUNSEY.

The petitioner in the above entitled action moves that she be discharged and assignes the following causes:

1. That the indictment upon which the requisition papers were issued by the governor of Massachusetts and upon which the warrant for extradition was issued by the governor of New Hampshire, contains three counts alleging three several and distinct felonies, and that by her arrest upon said warrant your petitioner is deprived of her liberty without due process of law in violation of the provisions of the first clause of the fourteenth amendment to the Constitution of the United States.

2. That under said indictment the petitioner is arrested, imprisoned and deprived of her liberty in a manner other than by the law of the land and is held to answer for a crime or offense which is not fully and plainly, substantially and formerly described to her, in violation of the provisions of article 15 of the constitution of New Hampshire, and the corresponding article of the constitution of Massachusetts, and is also deprived of the rights guaranteed to her by article 14 of the constitution of New Hampshire, in that, if obliged to proceed to introduce evidence at this time to secure her

discharge upon the several charges upon which she is held, she would not enjoy that certain remedy, conformably to the laws, for the injuries which she has received in her person, to which remedy she is entitled by said article 14.

MARTHA S. MUNSEY,
By her attorneys, EDWARD A. LANE,
SARGENT, NILES & MORRILL.

Filed Mar. 17, 1902.

10 At the April term 1902 the parties appeared and the court made the following findings of fact, ruling and order:—

11 MERRIMACK, *ss:*

Superior Court, April Term, 1902.

STATE *ex Relatione* MARTHA S. MUNSEY
v.
M. SWAIN CLOUGH.

Habeas corpus, against the sheriff of Merrimack county. Writ dated March 8, 1902. Hearing before Stone J., March 15, 1902. The defendant's return was as follows:

STATE OF NEW HAMPSHIRE, *Merrimack*, *ss:*

MARCH 15, 1902.

To Mr. Justice Stone:

I have here in court the within named Martha S. Munsey, who is now in my custody under a warrant from the governor of New Hampshire, on the requisition of the governor of Massachusetts, to arrest said Martha S. Munsey and deliver her to Jophanus H. Whitney, as the duly authorized agent of the Commonwealth of Massachusetts; and she has so been in my custody since March 4, 1902, when I received said warrant, a copy of which is hereto annexed.

M. SWAIN CLOUGH, *Sheriff.*

A copy of the warrant of the governor of New Hampshire was annexed to the return. By this warrant it appears that the relator stands charged by indictment in the county of Middlesex and Commonwealth of Massachusetts with the offense of "uttering forged wills," and that her surrender as a fugitive from justice is requested by the governor of Massachusetts. The requisition papers, which were put in evidence, contain a certified copy of the indictment, which, with the certificate, is as follows:

COMMONWEALTH OF MASSACHUSETTS, *Middlesex*, } *To wit:*

At the superior court, begun and holden at Cambridge, within and for the county of Middlesex, on the second Monday of February in the year of our Lord one thousand nine hundred and two.

The jurors for the Commonwealth of Massachusetts on their oath present, that Martha S. Munsey, on the twenty-eighth day of February in the year of our Lord one thousand eight hundred
12 and ninety-five, at Cambridge, in the county of Middlesex aforesaid, with intent to injure and defraud, did utter and publish as true, a certain forged instrument purporting to be a will, well knowing the same to be forged, which said instrument is of the tenor following, that is to say:

In the name of God I Samuel Welch of Lowell in the county of Middlesex & in the State of Massachusetts being weak in body but of a Sound mind and Good memory for which I have to praise before God do make publish and declare this my last will and testament and havin disposed of all my worldly estate in mamer following to wit

First I order and direct my Executors having named to pay my just debts and funaral charges as may be after my decease

Second I give and bequeath to my brother Johnothan the homestead place upon which he now live

Third I give and bequeath unto my beloved neases Jennie Davis of Lowell Mass and Martha Monsy of Pittsfield, N. H. and Minie Davis of Maine all of my Real estate where it may be found.

Fourth. i give and bequeath unto Jennie Davis and Martha Monsy and Minie Davis all my personal estaits and of evry discription whatsoever after the payment of my funeral expenses

Lastly i do hereby appoint the oldest of the three exechtrix of thris my last will & testament hereby revoking all former wills maid by me In writiness whereof I have hereby set my hand and seal this the twenty-six day of December in the year of our Lord one thousand eight hundred and seventy six ——

SAMUEL WELCH [SEAL]

Signed and sealed published and declared by me the said Samuel Welch as and for my last will and testamend in presants of these three witnesses ther to

E. G. CAMPBELL
HENRY A. BLAKE
C. H. GREEN

And the jurors aforesaid do further present that at no time since the commission of the offence herein set forth has said Martha S.

Munsey been usually and publicly a resident in said Commonwealth of Massachusetts.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present, that the said Martha
13 S. Munsey, on the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-five, at Cambridge, in the county of Middlesex aforesaid, with intent to injure and defraud, did utter and publish as true a certain forged instrument purporting to be a will, well knowing the same to be forged, which said instrument is of the tenor following, that is to say:

I in the name of god I Samuel Welch of Lowell in the county of Middlesex and in the State of Massachusetts being weak in body but of a Sound mind and memory of which i thank god do make publish and declare this my last will and testament and herein Dispose of all my worldly estates in Måner following to wit:

(first) i order and direct my Executors having named to pay my just dets and fruneral charges as may be after my Decease.

(second) i give and bequeath to my Brother Johnathan and homestead upon which he now livs.

(third) i give and bequeath unto my beloved neases Jennie Davis of Lowell and Martha Munsy of Pittsfield and Minie Davis of Maine all of my Real estates whersoever it may be found

(fourth) i give and bequeath unto Jennie Davis and Martha Munsy and Minie Davce all my Bonds and personal property of evry discription whatsoever after the payment of my frunaral expenses

(lastly) i do hereby appoint the oldest of three ho are liveing executor of this my last Will and testament hereby revoking all former Wills maid by me in Witnesses Whereof i have hereby set my hand and seal this the tenth day of May A. D. 1879

SAMUEL WELCH [SEAL]

Signed and sealed published and declared by me the said Samuel Welch as and for my last Will and testament in the presants of these three witnesses ther to.

E. G. CAMPBELL
C. H. GREEN
EDAWINE DOW

And the jurors aforesaid do further present that at no time since the commission of the offence herein set forth has said Martha S. Munsey been usually and publicly a resident of said Commonwealth of Massachusetts.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

14 And the jurors aforesaid for the Commonwealth of Massachusetts on their oath aforesaid do further present, that Martha S. Munsey, on the twentieth day of November, in the year of our Lord one thousand nine hundred and one, at Cambridge, in the county of Middlesex aforesaid, with intent to injure and defraud, did utter and publish as true a certain forged instrument purporting to be a will, well knowing the same to be forged, which said instrument is of the tenor following, that is to say:

I Samuel Welch of Lowell in the State of Massachusetts and County of Middlesex Being of poor health But of sound Mind Do make and Declare this to Be my last Will and testament as follows:
first I give and Devise and bequeath Unto the Widow Ebben Welch her lifetime the home on which she is now living of which I hold a mortgage and after her Death it is to be Divided With Jennie Davis, and Minie Davis and Martha Moncy.
Sectond I give and Devise and Bequeath Unto Jennie Davis of Lowell and Minie Davis Maine and Martha Moncy of Pittsfield all my Real Estate and all my personal property and all my Bonds of which will be in my house locked up in a desk
third I give and devise and Bequeath Unto my Brother Jonathan the Farm on which he now livs of which I hold a mortgage of
fourth I appoint as Executor the Oldest one living I further direct that my funeral Expenses shall be paid from money now on Deposit in the Warren institution Charlestown
lastly in Witness Whereof I place my hand and Seal this the 17 day of June 1886
Signed Sealed and acknowleged By the Said Samuel Welch as his last Will and testament in the presence of us Who in his presence and at his request and in the presence of Each other have Signed our Names hereunto as Witness thereof

HELEN S. CHANDLER
E. G. CAMPBELL
EDWIN DOW
C. H. GREENE

15 Against the peace of said Commonwealth, and contrary to the form of the statutes in such case made and provided.

A true bill.

JAMES G. HILL,
Foreman of the Grand Jury.

GEORGE A. SANDERSON,
District Attorney.

The foregoing indictment was found and returned into said superior court, by the grand jurors at the term thereof, held at Cambridge, within and for said county, on the second Monday of February, A. D. 1892, and ordered to be filed, and that a warrant issue

for the arrest of the said Martha S. Munsey, that she may be had before said court to answer to said indictment.

And now Walter C. Wardwell, deputy sheriff, the officer charged with the service of said warrant, comes into court with said warrant and makes return thereon, that he has made diligent search for the said Martha S. Munsey, and cannot find *him* within his precinct, and therefore returns said warrant without service. All of which appears of record in said court.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Cambridge aforesaid, this twenty-fourth day of February, A. D. 1892.

THEO. C. HURD, *Clerk.*

The requisition papers also contain an affidavit that the relator is a fugitive from justice, and has taken refuge in this State, as follows:

COMMONWEALTH OF MASSACHUSETTS, *Middlesex,* } *ss:*

I, Jophanus H. Whitney of Medford in the county of Middlesex and said Commonwealth, on oath depose and say that Martha S. Munsey who stands charged by indictment with the crime of uttering forged wills as is more fully set forth in the papers hereto annexed, has fled from the limits of said Commonwealth and is a fugitive from justice. And I further depose that at the time of the commission of said crime she was in the State of Massachusetts
16 in the county of Middlesex of said Commonwealth, and that at the same time and previous thereto she was a resident of Cambridge in the said county of Middlesex; that she fled from said Commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not now within the limits of the Commonwealth, but, as I have reason to believe, is now in Pittsfield, in the State of New Hampshire. The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week January last.

JOPHANUS H. WHITNEY.

Then personally appeared the above named Jophanus H. Whitney before me and made oath that the foregoing affidavit by him subscribed is true, this twenty-first day of February, A. D. 1902.

WALTER C. WARDWELL,
Justice of the Peace.

The requisition papers also contain a certificate from the district attorney, George A. Sanderson, reading in part as follows:

"Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills, committed in the county of Middle-

sex, on the twenty-eighth day of February, A. D. 1895; on the 17th day of May, A. D. 1895, and on the 20th day of November, A. D. 1901, and who to avoid prosecution fled from the jurisdiction of this Commonwealth and is now a fugitive from justice, and as I am informed is within the jurisdiction of said State of New Hampshire.

"And I further certify that the offence charged against the said fugitive is a felony and that said offence and punishment therefor is defined in section 1 of chapter 204 of the Public Statutes.

"Application for the arrest and return of the said fugitive has not been sooner made because the indictment was not found by the grand jury until the February sitting of the superior court in the year 1902.

"GEORGE A. SANDERSON,
"*District Attorney for Northern District.*"

The defendant excepted to the admission in evidence of the requisition papers, as constituting a review of the action of the executive.

The relator then made the following motion:

17 STATE OF NEW HAMPSHIRE, *Merrimack*, } ss:

In re MARTHA S. MUNSEY.

To the Honorable Charles F. Stone, associate justice of the superior court:

The petitioner in the above entitled action moves that she be discharged and assigns the following causes:

1. That the indictment upon which the requisition papers were issued by the governor of Massachusetts and upon which the warrant for extradition was issued by the governor of New Hampshire, contains three counts alleging three several and distinct felonies, and that by her arrest upon said warrant your petitioner is deprived of her liberty without due process of law, in violation of the provisions of the first clause of the fourteenth amendment to the Constitution of the United States.

2. That under said indictment the petitioner is arrested, imprisoned and deprived of her liberty, in a manner other than by the law of the land, and is held to answer for a crime or offence which is not fully and plainly, substantially and formally described to her, in violation of the provisions of article 15 of the constitution of New Hampshire, and the corresponding article of the constitution of Massachusetts; and is also deprived of the rights guaranteed to her by article 14 of the constitution of New Hampshire, in that, if obliged to proceed to introduce evidence at this time to secure her discharge upon the several charges upon which she is held, she would not enjoy that certain remedy, conformably to the laws, for

the injuries which she has received in her person, to which remedy she is entitled by said article 14.

The laws and constitution of the State of Massachusetts and the Constitution of the United States may be referred to as a part of the case.

MARTHA S. MUNSEY,
By her attorneys, EDWARD A. LANE,
SARGENT, NILES & MORRILL.

Upon this motion the court made the following ruling: "Motion denied, that the case may be transferred to the supreme court for their decision."

To this ruling the relator duly excepted.

CHARLES F. STONE,
Associate Justice Superior Court.

[Endorsed:] Merrimac. Case. State *ex rel.* Munsey *v.* Clough. Edward A. Lane. Sargent, Niles & Morrill. Mitchell & Foster.

18 Said case was transferred to the 1902 term of the supreme court of the State of New Hampshire and the action was continued to the October term of this superior court, at which term the parties appeared. On the 27th day of December 1902 the said supreme court filed the following opinion in said case:

19 DEC. 27, 1902.

MERRIMACK, *ss:*

STATE (*ex Rel.* MUNSEY)
v.
CLOUGH.

Habeas corpus. Trial before Stone, J., and case transferred from the April term, 1902, of the superior court.

The defendant, who is the sheriff of the county, states in his return that he has the custody of the relator under a warrant from the governor of this State, issued on the requisition of the governor of Massachusetts. The warrant recites that "it has been represented to me by the acting governor of the Commonwealth of Massachusetts that Martha S. Munsey stands charged with the crime of uttering forged wills which he certifies to be a crime under the laws of said Commonwealth, committed in the county of Middlesex in said Commonwealth, and has taken refuge in the State of New Hampshire, and the said governor of Massachusetts having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said Martha S. Munsey to be arrested and delivered to Jophanus H. Whitney, who is duly authorized to receive her into his custody and convey her back to the said Common-

wealth of Massachusetts. And whereas, the said representation and demand is accompanied by certified copy — an indictment, whereby the said Martha S. Munsey is shown to have been duly charged with the said crime and with having fled from said Commonwealth and taken refuge in the State of New Hampshire, which is duly certified by the acting governor of Massachusetts to be authentic and duly authenticated: Therefore, you are required to arrest and secure the said Martha S. Munsey wherever she may be found within this State, and afford her such opportunity to sue out a writ of *habeas corpus* as is prescribed by the laws of this State, and to thereafter deliver her into the custody of the said Jophanus H. Whitney to be taken back to the said Commonwealth from which she fled, pursuant to the said requisition."

From the copy of the indictment referred to, it appears that the relator was indicted by the grand jury of the county of Middlesex, in Massachusetts, on the second Monday of February, 1892, in which it is charged that the relator, on February 28, 1895, "at Cambridge in the county of Middlesex aforesaid, with intent to injure and defraud, did utter and publish as true, a certain forged instrument purporting to be a will, well knowing the same to be forged." In the second and third counts she is charged with similar offences committed respectively on May 17, 1895, and November 20, 1901. In each count the alleged forged will is set out in full.

20 In the certificate of the clerk of the court in which the indictment is pending, it is stated that the indictment was found and returned "on the second Monday of February, A. D. 1892." The requisition papers also contain the affidavit of Whitney, in which it is stated that the relator has "fled from the limits of said Commonwealth and is a fugitive from justice;" also that "at the time of the commission of said crime she was in the State of Massachusetts; * * * that she fled from said Commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not now within the limits of the Commonwealth, but, as I have reason to believe, is now in Pittsfield, in the State of New Hampshire."

The affidavit of the district attorney was submitted to the governor, in which he refers to Martha S. Munsey as one "who stands charged by indictment with the crime of uttering forged wills, committed in the county of Mlddlesex, on the 28th day of February, A. D. 1895, on the 17th day of May, A. D. 1895, and on the 20th day of November, A. D. 1901, and who to avoid prosecution fled from the jurisdiction of this Commonwealth and is now a fugitive from justice, and, as I am informed, is within the jurisdiction of said State of New Hampshire. And I further certify that the offence charged against the said fugitive is a felony, and that said offence and punishment therefor is defined in section 1 of chapter 204 of the Public Statutes. Application for the arrest and return of the said fugitive has not been sooner made because the indictment was

not found by the grand jury until the February sitting of the superior court in the year 1902."

The relator claiming that on the face of the documents submitted to the governor he was not authorized to issue his warrant, and that the warrant is defective, made a motion for her discharge, which was denied, subject to exception.

Edward A. Lane and Sargent, Niles & Morrill, for the relator.

Mitchell & Foster, for the defendant.

WALKER, *J.*:

One question presented by the case is whether the record evidence submitted to the governor, upon the proceeding before him for the extradition of the relator, shows, as a matter of law, that he exceeded his authority in issuing the warrant for her arrest and removal to Massachusetts. How far his duty was discretionary, and to what extent he was obliged to comply with the demand for the
21 surrender of the alleged fugitive from justice, are questions not necessarily material to the present inquiry. He has exercised whatever discretion he possesses, and has complied with the demand. He has issued his warrant for the arrest of the relator and for her return to Massachusetts. Has he thereby violated any of her rights of citizenship under the Constitution and laws of the United States or of this State?

The rendition of a fugitive from justice to the State from which he fled is authorized by the Constitution of the United States (art. IV, s. 2), which provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." To make this provision effectual, and to afford means for its practical operation, Congress has enacted that "whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the perso- charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." R. S. U. S., s. 5278.

As supplementary to these provisions, the legislature of this State has enacted the following statute: "If the governor is satisfied that the demand is conformable to law and ought to be complied with he shall issue his warrant under the seal of the State, authorizing

the agent who shall make the demand, either forthwith or at such time as shall be designated in the warrant, to take and transport such person to the line of the State, at the expense of such agent, and shall also, by the warrant require the civil officers within this State to afford all needful assistance in the execution thereof." P. S., c. 263, s. 8. If the governor has not substantially complied with these constitutional and statutory provisions, the relator must
22 be discharged from arrest. She cannot be forcibly removed from this jurisdiction, except by virtue of legal process and procedure. Unless she is one of the class of persons which the Federal Constitution makes liable to rendition, and unless the legal requirements in such cases have been substantially observed, the governor's warrant is void, and the court must order her discharge. It is the duty of the court to protect the rights of citizenship.

The question of the validity of the governor's warrant must be considerd in connection with the demand, the copy of the indictment, and the affidavits submitted to him. It is not essential that the warrant should contain a formal statement of all the facts upon which it is issued. Kingsbury'- case, 106 Mass. 223; People *v.* Pinkerton, 17 Hun. 199; *In re* Romaine, 23 Cal. 585. If an examination of the record evidence presented to the governor legally authorizes the finding of the necessary facts, it will be presumed, in the absence of evidence to the contrary, that he made such findings. It is insisted that the warrant is fatally defective because it contains no statement of a finding by the governor that the relator is a fugitive from justice. In Roberts *v.* Reilly, 116 U. S. 80, in which the warrant was similar to the one in this case, the court say (p. 95): "It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." In State *v.* Justus 84 Minn. 237, 243, the court say upon this subject:—"This is a matter upon which the chief magistrate granting the warrant should have evidence, although the law does not describe its character, nor the precise rules by which such fact shall be established. It would seem to follow that the issuance of the warrant embraces the exercise of a prerogative of the governor of the State where the fugitive is, and that it must be presumed, in the absence of proof to the contrary, where the executive acts in such case, that he has performed his duty in that respect. Hence, when a proper warrant has been issued, the burden of showing that the prisoner has not fled or is not a fugitive from justice rests upon the prisoner in *habeas corpus* proceedings." In that case the warrant did not contain a finding that the prisoner
was a fugitive. It simply recited that "a demand has been
23 made, pursuant to the Constitution and laws of the United States, by H. A. Northcot, acting governor of the State of Illinois, upon the governor of the State of Minnesota for the delivery

of Eddie McNichols as a fugitive from justice of the State of Illinois." The court held this sufficient, on the ground that technical precision is not necessary in the warrant. See also, *Ex parte* Reggel, 114 U. S. 642; Commonwealth *v.* Hall, 9 Gray 262, 266: Kingsbury's case, *supra;* Davis' case, 122 Mass., 324; People *v.* Donohoe, 84 N. Y. 438; *Ex parte* Sheldon, 34 Ohio St. 319.

What the result might be upon *habeas corpus* proceedings, if none of the written evidence required by law for the issuance of the warrant were before the court, and the validity of the warrant was attacked (People *v.* Pinkerton, 17 Hun. 199), it is unnecessary to inquire. If the evidence is legally sufficient to support the necessary facts, it must be presumed, even from a warrant which does not contain a full recital of such facts, that it was based upon their existence. No particular form of a warrant is prescribed, and an examination of the case shows that the warrant in this case is not an exceptional one. The case of *In re* Jackson, 2 Flip. 183, holding that a warrant was invalid because it recited that the person charged had been "represented" to be a fugitive from justice, instead of stating an express conclusion on this point, is against the weight of authority, and was substantially overruled by Roberts *v.* Reilly *supra*, 2 Moore Ext., s. 640.

Whether the relator is charged with a crime in another State, and whether she is a fugitive from justice, are questions upon which it was the duty of the governor to pass before ordering her removal from the State. "Under the act of Congress, it became the duty of the governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared: (1) that the demand by the executive authority of Pennsylvania was accompanied by a copy of an indictment, or affidavit made before a magistrate, charging Reggel with having committed treason, felony, or other crime within that State, and certified as authentic by her governor: (2) that the person demanded was a fugitive from justice." *Ex parte* Reggel, 114 U. S., 642, 649. "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun; but simply
24 that having, within a State, committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence he has left its jurisdiction, and is found within the territory of another." Roberts *v.* Reilly, 116 U. S. 80, 97.

In the matter of Voorhees, 32 N. J. Law, 141, 150, the court say: "A person who commits a crime within a State, and withdraws himself from such jurisdiction without waiting to abide the consequences of such act, must be regarded as a fugitive from the justice of the State whose laws he has infringed. Any other construction would not only be inconsistent with good sense, and with the obv-ous import

of the word to be interpreted in the context in which it stands, but would likewise destroy, for most practical purposes, the efficacy of the entire constitutional provision."

"The fact that a man is charged with crime in one State and is afterward found in another, has generally been regarded as *prima facie* evidence that he is a "fugitive." Drinkall *v.* Spiegel, 68 Conn. 441, 448: Kingsbury'- case *supra.*

The evidence that the relator departed from Massachusetts after the commission of the alleged crimes, and was found in this State, supports the necessary finding that she is a fugitive. The affidavit of Whitney tends to show that she fled "about the fourth day of November, A. D. 1901," after the dates of the crime alleged in the first two counts of the indictment, but before the date of the third crime. It may be true that she could not be a "fugitive" on account of a crime committed by her when not within the jurisdiction of Massachusetts, or that a person cannot be said to "flee" from a State unless he was personally there at the time of the alleged offence. Constructive presence may not be sufficient. 2 Moore Ext., ss. 581, 585, People *v.* Hyatt, 172 N. Y. 176.

But the fact, if it be one, that the relator departed from the demanding State before the commission of one crime alleged in the indictment, for which alone she could not be extradited, suggests no reason why she could not legally be returned for other crimes alleged to have been committed there before she left. The liability that she may be tried on the last count alone does not exclude her from the class of persons made liable to extradition by the Federal Constitution. She is still "a person * * * charged with * * * crime." The question is, not whether the governor might decline to extradite her, for that reason, or because he believed the demand was not made in good faith, but whether her rights of citizenship are infringed by her rendition to answer to such an indictment. Neither the constitution nor the statutes upon the subject make an exception of that character. Lascelles *v.* Georgia, 148 U. S. 537, 542, 547; Commonwealth *v.* Wright, 158 Mass. 149.

If the indictment upon which this proceeding is based had contained only the first count, but it appeared that another indictment containing the other counts was pending in the same court, that fact would not prevent the rendition of the prisoner, though the question in legal effect would be substantially the same as is presented here. The governor was justified in finding that she was a fugitive with reference to the first two counts in the indictment. But upon that question the relator is entitled to submit evidence and be heard; and the justice before whom the *habeas corpus* proceedings were returned may review the action of the governor in this respect. The governor's finding that the relator is a fugitive is not conclusive upon the court on *habeas corpus.* Church Hab. Corp., s. 474*a*; 2 Moore Ext., s. 640; Spear Ext. 391; Hartman *v.* Aveline 63 Ind. 344; Jones *v.* Leonard, 50 Ia. 106; *In re* Mohr, 73 Ala. 503. If his find-

ing of fact in this respect is erroneous, the prisoner is unlawfully restrained of her liberty and is entitled to a discharge. It is a principle of general application, that one cannot be finally deprived of his liberty except upon a judicial trial.

The fact that it appears from the indictment that the offences charged in the first two counts were committed more than six years before the finding of the indictment, does not preclude a finding that she was a fugitive from justice; and such finding by the governor was justified by the evidence before him. If Whitney's affidavit is ambiguous and may be open to more than one construction, so far as it relates to the length of time Mrs. Munsey resided in Massachusetts after the date of the offence alleged in the first count and before November 4, 1901, when he certifies she fled, it was not
26 incompetent as evidence, to be considered by the governor, upon the question whether she was a fugitive from justice as to the first two counts. It does not necessarily establish the proposition, as claimed by her, that during all that time she was "usually and publicly resident" (Mass. P. S., c. 213, s. 25) in that State. If it did, it would become necessary to consider the question whether under those circumstances she could be a fugitive from justice within the meaning of the law of extradition. The affidavit states unequivocally that she was "a fugitive from justice." This statement, though in some sense a conclusion of law, was held sufficient in *Ex parte* Reggel *supra*, where the court say (p. 653) that the accused should not be discharged "merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meagre as, perhaps, to admit of a conclusion different from that reached by" the governor. It was sufficient to make out a *prima facie* case. Whether, in this case, there was other evidence before the governor upon which his finding could be based, it is unnecessary to inquire.

The indictment upon which the requisition is founded consists of three counts, each charging the respondent with intentionally and fraudulently uttering and publishing as true "a certain forged instrument purporting to be a will." It is conceded that forging a will is a crime under the laws of Massachusetts. But it is claimed that the warrant is faulty, because it states that the relator is "charged with the crime of uttering forged wills." This is a sufficiently definite statement of the charges in the indictment for practical purposes, and affords no substantial or reasonable ground for holding the warrant to be void, especially when by a reference to the indictment its meaning is rendered sufficiently plain and definite.

The objection is made that the relator is charged in the indictment with three distinct and independent offences, and that for this reason the indictment is bad at common law and is repugnant to article XII of the bill of rights of Massachusetts, which provides that "no subject shall be * * * deprived of his * * * liberty, but by the judgment of his peers or the law of the land." It

is also claimed to be repugnant to the fourteenth amendment
27 of the Constitution of the United States for the same reason.

Whether this court has jurisdiction under the Federal Constitution and the law of Congress relating to extradition, to decide upon the validity of the formal allegations in the indictment, which substantially charges the fugitive with the commission of a crime, is a question which the weight of authority answers in the negative. Kentucky *v.* Dennison, 24 How. 66, 107; *Ex parte* Reggel, 114 U. S. 642, 651; *In re* Roberts, 24 Fed. Rep. 132; Roberts *v.* Reilly, *supra;* People *v.* Byrnes—33 Hun. 98, 101; Matter of Voorhees, 32 N. J. Law 141, 146; State *v.* O'Malley, 38 Minn. 243; Spear Ext. 498; 2 Moore Ext., ss. 550, 638; and cases cited *supra.* But without deciding whether the joinder of two or more counts in an indictment charging distinct offences is faulty as a matter of criminal pleading, it does not appear that in Massachusetts such joinder renders the indictment absolutely void. The indictment may still be sufficient to support a conviction under one of the counts. In Commonwealth *v.* Tuck, 20 Pick. 356, 361, it is said: "A defective indictment cannot be cured by verdict. If the crime be not correctly described, no judgment can be rendered either upon verdict or plea of guilty 2 Hale's P. C. 193; Commonwealth *v.* Morse, 2 Mass. (128) 130; Commonwealth *v.* Hearsey, 1 Mass. 137. But the objection now under consideration is totally different. It is not that the offence is defectively set forth, but that more than one offence is sufficiently set forth in the same indictment. The only argument which lies against the latter is, that it subjects the defendant to inconvenience and danger by requiring him to prepare himself to meet several charges at the same time. The appropriate remedy would be a motion to the court to quash the indictment, or to confine the prosecutor to some one of the charges'"

"The objection that the indictment is bad, because more than one offence is joined in it, cannot be sustained. It is settled in this Commonwealth that several offences may be charged in the same indictment when they are of the same general nature, and when the mode of trial and the nature of the punishment are the same." Commonwealth *v.* Brown, 121 Mass., 69, 82.

In Josslyn *v.* Commonwealth, 6 Met. 236, 239, Chief Justice Shaw remarks: "The next objection is, that there were two distinct offences charged in two distinct counts, which is irregular.
28 Without considering whether, if this is an irregularity, for which a court would, on motion, quash the indictment, or put the prosecutor to his election on which count to proceed (Commonwealth *v.* Tuck, 20 Pick. (356) 362), we think that, within certain limits, different offences of the same nature may be stated in different counts of an indictment, when the same mode of trial applies, and the same judgment is to be given."

"It is always open to the presiding judge to order a separate trial on each distinct charge, when there is any reason for supposing that the defendant will be perplexed in his defence, or unnecessarily

embarrassed by being put on trial for two distinct offences. We see no good reason for holding that it is illegal to present in the same indictment felonious offences of a similar character, and having a like punishment." Commonwealth *v.* Hills, 10 Cush. 530, 534. See, also, Commonwealth *v.* Carey 103 Mass. 214; Commonwealth *v.* Costello, 120 Mass. 358.

Even if it were conceded that this indictment is faulty for the reason assigned by the relator, and that a trial and conviction on all the counts would not be in accordance with "the law of the land," it would not follow that the indictment was a nullity and that her arrest thereon was illegal. The fact that it contains three counts does not make it necessary that she should be tried upon each, or prevent the entry of a *nolle prosequi* as to two of them and a trial as to the other; and a verdict of guilty under one count alone would not be erroneous because the indictment contained other counts for which she was not tried. Commonwealth *v.* Holmes, 103 Mass. 440. If she cannot under the Constitution of the United States or under that of Massachusetts be tried for three distinct offences set out in one indictment, it is not to be presumed that the courts of that State would sanction such procedure, but that they would protect her in the enjoyment of all of her constitutional rights. Her constitutional right to be tried according to the "law of the land" does not necessarily include a right to escape a trial upon one good count in a regularly returned indictment containing other counts. Commonwealth *v.* Cain, 102 Mass. 487, 489.

But it is not necessary to determine what the effect of the alleged misjoinder may be upon the validity of the indictment at
29 common law, or to discuss the question whether the decisions of the Massachusetts court above referred to, and many other similar cases in that jurisdiction, are repugnant to constitutional provisions.

If they are open to that objection, as the relator claims, the courts of that State, where her alleged crime was committed and where she must be tried, if tried at all, will afford her ample protection in all her constitutional rights. The contrary presumption cannot be entertained, if the Federal law providing for the extradition of alleged criminals is recognized as an effectual means of aiding in the enforcement of the criminal laws of the various States.

An authoritative determination of this question has been made by the Supreme Court of the United States, as far at least as the Federal Constitution is concerned. One Pearce was arrested in Texas, on a requisition from the governor of Alabama for his extradition for trial in the latter State on two indictments for embezzlement and larceny. He sought his discharge upon *habeas corpus*, on the ground that the indictments were insufficient to authorize his extradition, because it was not alleged therein that the offences were committed in Alabama, that no time or place were laid therein, and that it did not appear where the offences were committed. He relied entirely for his discharge upon the invalidity of the indict-

ments. The trial court in which the *habeas corpus* proceedings were instituted refused to discharge him. He thereupon took an appeal to the court of criminal appeals of Texas, where it was held that "if it reasonably appears upon the trial of the *habeas corpus* that the relator is charged by indictment, in the demanding State, whether the indictment be sufficient or not under the law of that State, the court trying the *habeas corpus* case will not discharge the relator, because of substantial defects in the indictment under the laws of the demanding State. To require this would entail upon the court an investigation of the sufficiency of the indictment in the demanding State, when the true rule is, that if it appears to the court that he is charged by indictment with an offence, all other prerequisites being complied with, the applicant should be extradited." *Ex parte* Pearce, 32 Texas, Cr. Rep. 301, 307.

30 The case was then brought before the Supreme Court of the United States, and the decision of the State court was affirmed in an opinion delivered by Chief Justice Fuller, in which he says:

"It was not disputed that the indictments were in substantial conformity with the statute of Alabama in that behalf, and their sufficiency as a matter of technical pleading would not be inquired into on *habeas corpus*. *Ex parte* Reggel, 114 U. S. 642. Nor was there any contention as to the proper demand having been made by the executive authority of the State from whence the petitioner had departed, or in respect of the discharge of the duty imposed by the Constitution and laws of the United States on the executive authority of the asylum State to cause the surrender. The question resolved itself, therefore, into one of the validity of the statute on the ground of its repugnancy to the Constitution, and the court of appeals declined to decide in favor of its validity. And if it could be said upon the record that any right under the Constitution had been specially set up and claimed by plaintiff in error at the proper time and in the proper way, the State court did not decide against such right, for the denial of the right depended upon a decision in favor of the validity of the statute.

What the State court did was to leave the question as to whether the statute was in violation of the Constitution of the United States, and the indictments insufficient accordingly, to the demanding State. Its action in that regard simply remitted to the courts of Alabama the duty of protecting the accused in the enjoyment of his constitutional rights, and if any of those rights should be denied him, which is not to be presumed, he could seek his remedy in this court. We cannot discover that the court of appeals, in declining to pass upon the question raised in advance of the courts of Alabama, denied to plaintiff in error any right secured to him by the Constitution and laws of the United States, or that the court in announcing that conclusion erroneously disposed of a Federal question." Pearce *v.* Texas, 155 U. S. 311, 313, 314; *Ex parte* Hart, 59 Fed. Rep. 894.

As the relator is substantially charged with the commission of one crime at least in Massachusetts, upon an indictment properly authenticated, and as it appears that the form of the indict-
31 ment, if peculiar, is in accordance with the uniform practice in that State, this court will neither affirm nor deny the constitutionality of that method of procedure in the courts of the demanding State. To do so would be based upon the assumption of a right to impugn the validity of the decisions of a sister State, and to hold that the relator could not be extradited unless it appeared that her trial in that State would be in accordance with the ideas of this court upon the question of its constitutionality. Such a holding, while opposed to the ordinary principles of comity existing between the States, would go far towards abrogating the salutary provisions of the Federal law upon the subject of extradition. People *v.* Byrnes, 33 Hun. 98, 101, 104. So far as the trial of the question of her rendition is concerned, the joinder of counts in the indictment presents no serious difficulty.

The evidently clerical error in the affidavit of the clerk of the court, that the indictment was returned "on the second Monday of February, A. D. 1892" did not preclude a finding by the governor that the true date was the second Monday of February 1902. The caption of the indictment, as well as the affidavit of the district attorney, fully authorized that conclusion, which is placed beyond peradventure by an amendment of the clerk's affidavit in this court. The objection urged on this ground is a refinement of technical reasoning which has nothing to commend it in the modern administration of justice in criminal cases.

Nor does the fact that the warrant was addressed to the sheriff of Merrimack county, and not to the agent appointed by the demanding State, afford any reason for the relator's discharge. The statute (P. S., c. 263, s. 8) does not require that the warrant should be directed to the agent, but that it should authorize him "to take and transport" the fugitive out of the State, and should require the civil officers of the State to render necessary assistance for that purpose. The warrant was issued in compliance with these requirements.

As the relator has not succeeded in showing that any of her rights of citizenship are jeopardized by the action of the governor, the denial of her motion for a discharge, upon the reserved case, presents no error.

Exception overruled.

All concurred.

32 On the 28th day of January 1903 the following order was received from the said supreme court:

THE STATE OF NEW HAMPSHIRE:

Supreme Court.

STATE
v.
M. SWAIN CLOUGH. } No. 170.

To the clerk of the superior court for the county of Merrimack:

I hereby certify that in the above entitled action, on the twenty-seventh day of December A. D. 1902, it was ordered by the supreme court that the exception be overruled.

Attest: A. J. SHURTLEFF, *Clerk.*

January 28 1903.

33 The said superior court made further findings of fact and orders in the case as follows:

34 MERRIMACK, *ss:*

Superior Court.

STATE *ex Relatione* MARTHA S. MUNSEY }
vs.
M. SWAIN CLOUGH. }

Habeas corpus against the sheriff of Merrimack county, dated March 8, 1902.

Adjourned hearing before Stone, justice, March 28, 1903.

The case is the same as that reported in 71 N. H. 594.

The petition for the writ of *habeas corpus* is in part as follows:

"Your petitioner avers that she is illegally restrained of her liberty, because the proceedings and process upon which the executive warrant was issued by the governor of the State of New Hampshire are irregular and defective, and the evidence filed in support thereof is insufficient, the documentary evidence contradictory, and, assuming all the evidence to be true, is not sufficient to warrant the extradition of your petitioner.

"Third. That your petitioner is not a 'fugitive from justice.'

"Fourth. Because the governor of the State of New Hampshire, upon the hearing on the application for the issue of said executive warrant, declined and refused to hear or consider any evidence from your petitioner, or in behalf of your petitioner, upon the question of whether she was a 'fugitive from justice,' or upon any other question, and ruled that the only evidence which he would consider, and upon which he based the issuance of said warrant, was the docu-

mentary evidence offered and filed in support of the requisition made by the governor of Massachusetts.

"Fifth. Because the only evidence considered by the governor of the State of New Hampshire, upon which he issued the warrant on the aforesaid requisition, was documentary evidence filed in support of the requisition of the governor of the Commonwealth of Massachusetts, and because he refused and declined to hear any evidence, either documentary or oral, offered in behalf of your petitioner."

35 At the adjourned hearing the relator, subject to the defendant's exception, introduced evidence from which it appeared that the relator was arrested March 3, 1902, by the sheriff for Merrimack county, upon a complaint and warrant, under sections 1 and 2, chapter 263, of the Public Statutes, charging her with uttering forged wills and being a fugitive from justice.

The requisition papers were filed with the secretary of state March 3, and on March 4 were laid before the governor, when counsel for the relator appeared before the governor and stated that they desired a hearing before him before a warrant should be granted on the requisition papers.

Counsel for the State of Massachusetts opposed this application, taking the ground that questions of fact should not be determined by the governor.

The relator's counsel renewed their claim that she was entitled to a hearing upon questions of fact, and in particular upon her claim that she was not a fugitive from justice.

It was pointed out to the governor, by the relator's counsel, that she was already in custody, for the purpose of securing her person with a view to extradition.

The governor refused to hear any testimony upon any question of fact, and upon the advice of the attorney-general issued his warrant upon the requisition papers without other testimony than that contained in those papers.

The relator then introduced the requisition papers upon which the warrant was issued, subject to the defendant's exception.

The preamble to the requisition, signed by the acting governor of Massachusetts, is as follows:

"Whereas, it appears by certain documents which are hereunto annexed, and which I certify to be authentic and duly authenticated, in accordance with the laws of this Commonwealth, that Martha S. Munsey stands charged with the crime of uttering forged wills, which I certify to be a crime under the laws of this Commonwealth, committed in the county of Middlesex, in this Commonwealth; and, it having been represented to me that she has fled from the justice of this Commonwealth and may have taken refuge in the State of New Hampshire." The demand of the governor was as follows: "Now, therefore, pursuant to the provisions of the Constitution and the laws of the United States in such case made and provided, I do hereby require that the said Martha S. Munsey be apprehended

and delivered to Jophanus H. Whitney, who is hereby authorized to receive and convey her to the Commonwealth of Massachusetts, there to be dealt with according to law.

36 "In witness whereof I have hereunto signed my name and caused the seal of the Commonwealth to be affixed at the capitol in Boston, this twenty-eighth day of February, in the year of our Lord one thousand nine hundred and two.

"By his honor, the lieutenant-governor, acting governor,

"WM. M. OLIN,
"*Secretary of the Commonwealth.*

The governor's requisition contains no other authentication of any of the accompanying papers.

Following the requisition is a certificate of the district-attorney, which is as follows:

"COMMONWEALTH OF MASSACHUSETTS, }
"*Middlesex,* } *ss:*

FEBRUARY 26, A. D. 1902.

"To His Excellency the Governor.

"SIR: I have the honor to request that you issue a requisition upon the governor of the State of New Hampshire for the extradition of Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills, committed in the county of Middlesex, on the twenty-eighth day of February, A. D. 1895, on the seventeenth day of May, A. D. 1895, and on the twentieth day of November, A. D. 1901, and who, to avoid prosecution, fled from the jurisdiction of this Commonwealth and is now a fugitive from justice, and, as I am informed, is within the jurisdiction of said State of New Hampshire.

"I hereby certify that, in my opinion, the ends of public justice require that the alleged criminal be brought to this State for trial at the public expense, and that I am willing such expense shall be a charge on the county in which the crime was committed, to wit, the county of Middlesex.

"I also certify that I have carefully examined into the facts and verily believe that there is sufficient evidence to secure a conviction of the said fugitive.

"I designate and recommend Jophanus H. Whitney, a public officer, viz., a district police officer, as a proper person to be appointed agent of the Commonwealth, and certify that he has no personal interest in the arrest and return of the fugitive other than that of a proper performance of official duty.

"I am not aware of, and verily believe there never has been, any former application for a requisition for the same person, for the same offense, which is the basis of this application.

37 "I am not aware and verily believe the said fugitive is not now under either civil or criminal arrest.

"I further certify that the requisition for her extradition is made in good faith, with the sole intent to prosecute her for said crime, and not secure *his* return to this Commonwealth to afford opportunity to serve *him* with civil process, nor for any other purpose.

"And I further certify that all papers in duplicate have been compared with each other, and are in all respects exact counterparts.

"And I further certify that the offence charged against the said fugitive is a felony, and that said offence and punishment therefor is defined in section one of chapter two hundred and four of the Public Statutes.

"Application for the arrest and return of the said fugitive has not been sooner made because the indictment was not found by the grand jury until the February sitting of the superior court in the year 1902.

"Very respectfully,

"GEORGE A. SANDERSON,
"*District Attorney for the Northern District.*"

Then follows the certificate of the secretary of state of Massachusetts, to the effect that Albert Mason is chief justice of the superior court, and Theodore C. Hurd, clerk of said court for Middlesex county, and that their signatures to the annexed papers are genuine.

Then follows a certificate of Chief Justice Mason to the official character of the clerk, Hurd, his custody of the files and records of the court, his right to certify copies of such files and records, and that his attestation to the annexed papers is in due form.

Then follows a copy of the indictment and of the record of its filing in court, verified by the clerk.

The next paper is a copy of the capias writ for the arrest of the relator, with the return of Walter C. Wardwell, deputy sheriff, endorsed thereon, to the effect that he has been unable to find her in his precinct.

The next paper is a copy of an affidavit of Jophanus H. Whitney, purporting to have been sworn to before Walter C. Wardwell, justice of the peace, being the copy printed on pages 5 and 6 of the case heretofore transferred (No. 170 Merrimack), there described as an "affidavit."

38 The following and last paper accompanying the requisition is the certificate of the clerk, which is as follows:

'COMMONWEALTH OF MASSACHUSETTS, } ss:
Middlesex, }

"I, Theodore C. Hurd, clerk of the superior court within and for the county of Middlesex, do certify that the foregoing papers, numbered one, two and three, are true copies of the indictment pending

in said superior court, of the capias issued thereon, with the return of the officer thereon, and also the affidavit of said officer filed in said case.

"In testimony whereof I hereunto set my hand and affix the seal of said superior court, this twenty-fourth day of February, A. D. 1902.

"THEO. C. HURD,
"*Clerk of Superior Court.*"

None of the foregoing requisition papers were numbered.

The only copy of an affidavit contained in the papers is that of Jophanus H. Whitney, above referred to.

There is no authentication, or certification, of the official character of Walter C. Wardwell, as a justice of the peace.

The certificate of the district attorney is not under oath, nor is there any authentication, or certification, among the papers, of his official character or authority.

It appeared that the relator was taken into custody on the governor's warrant on the fourth day of March, 1902, and petitioned for the writ of *habeas corpus* on the fifth day of March, and that the same was granted on the eighth day of March, 1902; and that the hearing thereon was the fifteenth of the same month.

At the close of this evidence the relator's counsel rested and moved that she be discharged, which motion was denied, subject to the relator's exception.

The court thereupon ordered that the relator proceed to introduce evidence upon the question whether she was in fact a fugitive from justice. This the relator's counsel declined to do, upon the ground that such action, on their part, would constitute a waiver of their right to object to the refusal of the governor to grant a hearing upon this question of fact.

39 The court then directed that counsel for the relator state whether the relator waived the right to then, or at any future time, introduce further evidence upon this, or any question of fact, and counsel for relator declared that she did waive that right.

No evidence was offered by the relator either upon the question whether the relator was a fugitive from justice, or upon any other question of fact, other than as above stated.

The questions arising upon the relator's motion, and the exceptions above stated are reserved.

CHARLES F. STONE,
Presiding Justice.

40 [Endorsed:] 264 Merrimack. Case. State *v.* Clough. Edward A. Lane. Mitchell & Foster. Sargent, Niles & Morrill. Entered Apr. 8 1903 Pl'f's brief by May 8 1903 D'f't's brief by May 23 1903 Hearing Jun- session 1903.

41 Said case was transferred to the 1903 term of said supreme court and the action was continued to the present term of the superior court; and now the parties appear. On the second day of June 1903 the supreme court files the following opinion in said case:—

42 MERRIMACK:

STATE
v.
CLOUGH. } 264.

Habeas corpus. Trial in the superior court before Stone, J., at an adjourned hearing March 28, 1903.

The relator after submitting the record evidence presented before the governor and causing it to appear that she was denied a hearing before him, moved to be discharged, which motion was denied, subject to exception. The other facts sufficiently appear in the opinion.

Edwin A. Lane, Sargent, Niles & Morrill for the relator.

Mitchell & Foster for the defendant.

BINGHAM, *J.*:

The relator contends that the warrant upon which she was arrested was illegally issued, because she was not permitted to be heard before the governor upon the question whether she was a fugitive from justice, and assigns this as a reason why she should be discharged from arrest.

It was a question of fact to be determined in the first instance by the governor, whether the relator was a fugitive from justice (*In re* Cook, 49 Fed. R. 833, 838); but she was then not entitled as of right to be heard. It was discretionary with the governor to grant or deny her request. It is not the practice in such proceedings to give the accused notice before the rendition warrant is issued, and the act of Congress and the statutes of this State do not contain a provision requiring that she should be notified. The reason for the omission of such a provision is apparent,—if notice were required, the practical operation of the law would be rendered nugatory and its purpose defeated. It is an *ex parte* proceeding and necessarily so. *In re* Cook, *supra*, 838.

While the presence of the relator at the hearing obviated the usual objection to giving the accused notice, yet her presence did not create a legal right to be heard, and no such right previously existed.

43 If the relator had the right not to be removed from the State without a judicial trial, the issuing of the warrant for her arrest did not conclude her right in this respect. Under the law of this State she could sue out a writ of *habeas corpus* and test the question, whether she was a fugitive from justice; and if it were made to appear to the court that the finding of the governor

on this question was erroneous, she would be entitled to her discharge. State *v.* Clough, 71 N. H. 594, 600, 601. It was also expressly provided in the rendition warrant that she should be afforded an opportunity to sue out a writ of *habeas corpus* before being delivered over to the Massachusetts authorities. She has availed herself of that privilege; but in the trial before the superior court she declined and expressly waived the right to then, or at any future time, offer evidence showing that she was not a fugitive from justice, and contented herself with submitting the record evidence presented to the governor and causing it to appear that she had been denied a hearing before him.

As the relator was entitled, in the trial before the superior court, to review the action of the governor and be discharged, if his finding upon this question of fact was erroneous, or if there was no evidence from which he was warranted in making the finding, we are unable to see wherein she has been deprived of any right to be heard to which she was legally entitled.

As the governor should not have issued his warrant without proof that the accused was a fugitive from justice (State *v.* Clough, *supra*, 598,599, *Ex parte* Reggel, 114 U. S. 642), it is argued that the record evidence was incompetent and insufficient to warrant such a finding. But the character of proof essential to establish the fact is not prescribed by the act of Congress (R. S. s. 5278), or the statutes of this State. P. S. c. 263, ss. 7, 8. And while it has been said that "the executive of the State in which the accused is found does not fail in duty if he makes it a condition precedent that it be shown to him by competent proof that the accused is, in fact, a fugitive from justice" (*Ex parte* Reggel, *supra*), this does not mean that he shall not receive evidence that fails to meet the requirements of legal proof, if he deems it advisable. It appears to have been the policy of Congress, and of the legislature, to permit the chief executive to determine the question upon such proof as seems to him worthy of credit. And in Roberts *v.* Reilly, 116 U. S. 80, 95; and *In re* Cook, *supra* 838, it was held that the executive of the State upon whom the demand is made is to decide the question, "upon such evidence as he may deem satisfactory."

44

Among the documents accompanying the requisition of the governor of Massachusetts, and which he certified to be authentic and duly authenticated, was a copy of an affidavit made by Jophanus H. Whitney, purporting to have been sworn to before a justice of the peace, and in which it was stated that the relator had fled from the limits of said Commonwealth and was a fugitive from justice; also that at the time of the commission of said crime she was in the State of Massachusetts.

This copy of an affidavit would not answer the requirements of legal proof in a court of justice; and the same is true of the original affidavit. But legal rules prescribing the competency of proof do not, in the absence of statutes, govern the admission of evidence in

extradition proceedings, except so far as the executive may see fit to adopt them.

A statute of Massachusetts provides that sworn proof, that the accused is a fugitive from justice, shall accompany an ap-
45 plication for a requisition to the governor of that State. Mass. R. L. c. 217, s. 11. The original affidavit of Whitney, from which the copy here under consideration was made, is without doubt the sworn proof required by the statute of that State to be there filed with the governor; and we cannot say that the governor of this State was not justified in receiving a copy of that sworn proof in evidence and treating it as worthy of credit.

That the Whitney affidavit contained evidence warranting a finding that the accused was a fugitive from the justice of Massachusetts, and was actually present in that State at the time of the commission of the crime charged, has already been decided. State *v.* Clough, *supra*.

The relator's motion to be discharged was properly denied. Exception overruled.

46 On the third day of July 1903 the following order is received from said supreme court:

THE STATE OF NEW HAMPSHIRE:

Supreme Court.

STATE *v.* CLOUGH. } No. 264.

To the clerk of the superior court for the county of Merrimack:

I hereby certify that in the above entitled action, on the 2d day of June A. D. 1903, it was ordered by the supreme court that the exception be overruled.

Attest: A. J. SHURTLEFF, *Clerk.*

July 3, 1903.

47 On the same third day of July 1903 the plaintiff, Martha S. Munsey, files the following objections to judgment:—

48 MERRIMACK, ss:

Superior Court, April Term, 1903.

STATE (*ex Relatione*) MARTHA S. MUNSEY
v.
M. SWAIN CLOUGH.

This relator objects to rendition of judgment against her in this case by the superior court for the following reasons:

First. Because under the fifth amendment of the Constitution of the United States and under section 1 of the fourteenth amendment to said Constitution, as well as under section 2 of article 4 of said Constitution and section 5278 of the Revised Statutes of the United States, the governor exceeded his authority in issuing his warrant for her arrest and removal to Massachusetts, because the record evidence before him did not show her to be a fugitive from justice as to all the crimes with which she was charged and for which she was demanded in this extradition proceeding, but on the contrary showed her to have left the State prior to the alleged commission of the third crime for which she was so demanded, hence under said organic and statutory provisions of law she is entitled to be discharged.

Second. Because under said statutory and constitutional provision the evidence contained in the requisition papers was legally insufficient to justify the governor in finding your relator to be a fugitive from justice as to any one of the crimes for which she was demanded, in said extradition proceeding, hence, under said organic and statutory provisions of law she is entitled to be discharged.

Third. Because under said statutory and constitutional provision of law the documentary evidence submitted to the governor was not competent to be considered by him on the question whether your relator was a fugitive from justice and could not authorize a finding to that effect, and a rendition warrant based on such finding, hence, under said provisions of law, she is entitled to be discharged.

Fourth. Because under said statutory provision and under said constitutional provisions she was entitled, as a matter of right to be heard when she appeared before the governor at the time the requisition papers were submitted to him, and asked to be
49 heard on her claim that she was not a fugitive from justice, and that his refusal to hear her and to admit any testimony other than that contained in the requisition papers was not "due process of law" within the meaning of that term as used in the fifth amendment to the Constitution of the United States, and was not "due process of law" within the meaning of that term as used in section 1 of the fourteenth amendment to said Constitution, and hence the issue of the rendition warrant by him and your relator's arrest thereon was illegal and she is entitled to her discharge under

the provision of said fifth amendment to the Constitution of the United States, and also under the provision of section 1 of the fourteenth amendment to said Constitution.

All of the foregoing reasons for the discharge of your relator were urged upon the supreme court in the briefs of your relator's counsel and these reasons are herewith urged and filed in this superior court as objections to a final judgment by it against her.

MARTHA S. MUNSEY,
By her att'y, EDWARD A. LANE.

Filed July 3, 1903.
A. J. SHURTLEFF, *Clerk.*

50 MERRIMACK, *ss:*

Superior Court, April Term, 1903.

STATE
v.
M. SWAIN CLOUGH.

In the above entitled action it is ordered that there be judgment for the defendant July 3, 1903.

It is therefore considered by the court that said defendant recover of said plaintiff costs of suit taxed at seventy-one dollars.

On the same 3d day of July 1903 the plaintiff, Martha S. Munsey, files the following motion :—

51 MERRIMACK, *ss:*

Superior Court, April Term, 1903.

STATE (*ex Rel.*) MARTHA S. MUNSEY
v.
M. SWAIN CLOUGH.

Your relator in above named *habeas* proceeding moves for a stay of proceedings on the judgment in this case pending application for writ of error from the Supreme Court of the United States to this court and the proceedings thereunder.

MARTHA S. MUNSEY,
By her att'y, EDWARD A. LANE.

Filed July 3, 1903.

Motion granted.

52 On the 23d day of July 1903 the plaintiff files the following petition :—

53 UNITED STATES OF AMERICA, }
State of New Hampshire. }

To the Honorable Robert M. Wallace, chief justice of the superior court of the State of New Hampshire:

Petition of Martha S. Munsey of Pittsfield, in the county of Merrimack, State of New Hampshire, respectfully shows that she was arrested on the rendition warrant of the governor of said State on the fourth day of March, A. D. 1902, and on the following day petitioned Justice Stone of your superior court for a writ of *habeas corpus* as by the record now remaining in said court appears.

Said writ of *habeas corpus* was granted by said Justice Stone on the eighth day of March, A. D. 1902, and the hearing thereon was held before him on the fifteenth day of said month, when the sheriff of the county of Merrimack, M. Swain Clough, to whom said rendition warrant was addressed, made the following return on said writ:

STATE OF NEW HAMPSHIRE, }
Merrimack, } *ss:*

MARCH 15, 1902.

To Mr. Justice Stone:

I have here in court the within named Martha S. Munsey, who is now in my custody under a warrant from the governor of New Hampshire, on the requisition of the governor of Massachusetts to arrest said Martha S. Munsey and deliver her to Jophanus H. Whitney as the duly authorized agent of the Commonwealth of Massachusetts: and she has so been in my custody since March 4, 1902, when I received said warrant, a copy of which is hereto annexed.

M. SWAIN CLOUGH, *Sheriff.*

Your petitioner then introduced in evidence the governor's warrant and the record on which he based his action in issuing it, all of which appears in the record of the case, and moved that she be discharged.

Upon this motion the court made the following ruling: "Motion denied, that the case may be transferred to the supreme court
54 for their decision."

To this ruling your petitioner duly excepted.

The legal questions thus arising were reserved for the decision of said supreme court, and an adjournment was taken to await the result.

On December twenty-seventh, A. D. 1902, said supreme court rendered a decision overruling the exception taken as above.

Whereupon an adjourned hearing was held in your superior court before Justice Stone at the court house in Concord in said county of Merrimack on the twenty-eighth day of March, A. D. 1903.

At said adjourned hearing it appeared that the governor of the State of New Hampshire denied your petitioner a hearing prior to issuing his rendition warrant and certain other additional facts also appeared as shown by the record in the case.

After your petitioner, subject to exception, had introduced the record on which the governor acted, and had also shown his refusal to hear her, she rested and moved that she be discharged, which motion was denied subject to her exception.

The court thereupon ordered that your petitioner proceed to introduce evidence upon the question whether she was in fact a fugitive from justice.

This your petitioner's counsel declined to do upon the ground that such action, on their part, would constitute a waiver of their right to object to the refusal of the governor to grant a hearing upon this question of fact.

The court then directed that counsel for your petitioner state whether she waived the right to then, or at any future time, introduce further evidence upon this, or any question of fact, and counsel for your petitioner declared that your petitioner did waive that right.

The questions arising upon your petitioner's motion for her discharge and the exception taken by her as above were reserved for the decision of the supreme court.

On June second, A. D. 1903, said supreme court rendered a decision overruling the exception taken by your petitioner, and
55 on the third day of July, A. D. 1903, a certificate was filed by the clerk of the supreme court in the superior court of which the following is a copy:

THE STATE OF NEW HAMPSHIRE:

Supreme Court.

STATE
v. } No. 264.
CLOUGH.

To the clerk of the superior court for the county of Merrimack:

I hereby certify that in the above entitled action on the 2nd day of June, A. D. 1903, it was ordered by the supreme court that the exception be overruled.

Attest: A. J. SHURTLEFF, *Clerk.*

July 3, 1903."

Whereupon on said 3rd day of July A. D. 1903, your petitioner filed in said superior court the following objections;—

"MERRIMACK, ss:

Superior Court, April Term, 1903.

STATE (*ex Relatione*) MARTHA S. MUNSEY
v.
M. SWAIN CLOUGH.

This relator objects to rendition of judgment against her in this case by the superior court for the following reasons:

First. Because under the fifth amendment to the Constitution of the United States, and under section 1 of the fourteenth amendment to said Constitution, as well as under section two of article four of said Constitution and section 5267 of the Revised Statutes of the United States, the governor exceeded his authority in issuing his warrant for her arrest and removal to Massachusetts, because the record evidence before him did not show her to be a fugitive from justice as to all the crimes with which she was charged and for which she was demanded in this extradition proceeding, but on the contrary showed her to have left the State prior to the alleged commission of the third crime for which she was so demanded, hence under said organic and statutory provisions of law she is entitled to be discharged.

Second. Because under said statutory and constitutional provisions the evidence contained in the requisition papers was legally
56 insufficient to justify the governor in finding your relator to be a fugitive from justice as to any one of the crimes for which she was demanded in said extradition proceeding, hence under said organic and statutory provisions of law she is entitled to be discharged.

Third. Because under said statutory and constitutional provisions of law the documentary evidence submitted to the governor was not competent to be considered by him on the question whether your relator was a fugitive from justice and could not authorize a finding to that effect, and a rendition warrant based on such finding, hence, under said provisions of law, she is entitled to be discharged.

Fourth. Because under said statutory provision and under said constitutional provisions she was entitled, as a matter of right, to be heard when she appeared before the governor at the time the requisition papers were submitted to him, and asked to be heard on her claim that she was not a fugitive from justice, and that his refusal to hear her and to admit any testimony other than that contained in the requisition papers was not "due process of law" within the meaning of that term as used in the fifth amendment to the Constitution of the United States, and was not "due process of law" within the meaning of that term as used in section one of the fourteenth amendment to said Constitution, and hence the issue of the

rendition warrant by him and your relator's arrest thereon was illegal and she is entitled to her discharge under the provision of said fifth amendment to the Constitution of the United States, and also under the provision of said section one of the fourteenth amendment to said Constitution.

All of the foregoing reasons for the discharge of your relator were urged upon the supreme court in the briefs of your relator's counsel and these reasons are herewith urged and filed in this superior court as objections to a final judgment by it against her.

MARTHA S. MUNSEY,
By her att'y, EDWARD A. LANE."

57 And thereafterward on the same day, notwithstanding said objections, the following judgment was rendered:

MERRIMACK, ss:

Superior Court, April Term, 1903.

STATE
v.
M. SWAIN CLOUGH.

In the above entitled action it is ordered that there be judgment for the defendant.

July 3, 1903.

Whereupon, thereafterward, on the same day the following motion was filed in said superior court:

MERRIMACK, ss:

Superior Court, April Term, 1903.

STATE (*ex Rel.*) MARTHA S. MUNSEY
v.
M. SWAIN CLOUGH.

Your relator in above named *habeas corpus* proceedings moves for a stay of proceedings on the judgment in this case pending application for writ of error from the Supreme Court of the United States to this court, and the proceedings thereunder.

MARTHA S. MUNSEY,
By her att'y, EDWARD A. LANE.

Whereupon the above motion was granted.

MARTHA S. MUNSEY,
By her att'y, EDWARD A. LANE.

STATE *ex-Relatione* MARTHA S. MUNSEY
v.
M. SWAIN CLOUGH.

Inasmuch as your relator moved for her discharge in the superior court, which motion was denied subject to her exception, which exception was finally overruled and judgment entered against her notwithstanding the objections filed by her in said superior court, she claims there is error in the record and proceeding and in said judgment and makes the following

58 *Assignment of Errors.*

First. Because under the provision of the fifth amendment to the Constitution of the United States that no person shall be "deprived of life, liberty or property without due process of law," also of the provision in section one of the fourteenth amendment to said Constitution "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law;" also under the provision in section two, article four of said Constitution "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on the demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime;" also under the provision of section 5278 of the Revised Statutes of the United States there was error in law in holding that the record evidence submitted to the governor justified the issue of his rendition warrant against your relator when such evidence failed to show her a fugitive from justice as to all the crimes with which she was charged and for which she was demanded in this extradition proceeding; but showed that she left the State prior to the date of the alleged commission of one of said crimes for which she was demanded for trial, and that said holding of the law and said judgment rendered in pursuance of such holding violated the statutory and constitutional rights of your relator under said organic and statutory provisions of law.

Second. Because in view of all of said provisions of the organic and statutory law of the United States it was error in law to hold that the evidence contained in the requisition papers submitted to the governor legally authorized a finding by him that your relator was a fugitive from justice as to any one of the crimes for which she was demanded in said extradition proceeding, and that such holding of the law and said judgment rendered in pursuance of such holding violated the statutory and constitutional rights of your relator under said organic and statutory provisions of law.

59 Third. Because in view of all of said provisions of the organic and statutory law of the United States it was error

in law to hold that the documentary evidence submitted to the governor was competent to be considered by hin on the question of fact whether your relator was a fugitive from justice and that there was especial error in law in holding that a copy of the Whitney affidavit was competent to be considered by the governor on said question of fact, and that such holding of the law and said judgment rendered in pursuance of such holding violated the statutory and constitutional rights of your relator under said organic and statutory provisions of law.

Fourth. Because under said provisions of the organic and statutory law of the United States and especially under said provision in the fifth and in the fourteenth amendments to the Constitution of the United States it was error in law to hold that your relator could not be heard, as a matter of right, before the governor at the time and under the circumstances in which she appeared before him, and that his refusal to hear her was "due process of law" and deprived her of no legal right which she possessed and that such holding of the law and said judgment rendered in pursuance of such holding violated the statutory and constitutional rights of your relator under said organic and statutory provisions of law.

Fifth. Because under said provisions of the organic and statutory law of the United States it was error in law to hold that your relator was shown to be substantially charged with crime when the record duly authenticated by the governor of Massachusetts and submitted to the governor of New Hampshire showed that the indictment obtained against her was filed in the superior court in and for the county of Middlesex, State of Massachusetts in the month of February, A. D. 1892, and the crimes alleged therein were charged to have been committed by her on the twenty-eighth day of February, A. D. 1895, on the seventeenth day of May A. D. 1895 and on the twentieth day of November, A. D. 1901, and that such holding of the law and said judgment rendered in pursuance of said holding violated the statutory and constitutional rights of your relator
60 under said organic and statutory provisions of law.

Sixth. Because under all of said provisions of the organic and statutory law of the United States your relator was illegally restrained of her liberty and was entitled to be discharged, hence, there was error in law in rendering said judgment against her, and the rendering of it violated the statutory and constitutional rights of your relator as herein set forth.

As all of the foregoing holdings of the court were made contrary to the contention of your relator and despite her claim that she was entitled to be discharged under said organic and statutory provisions of law, and as said judgment has been rendered against her in said superior court held in and for the county of Merrimack in the State of New Hampshire notwithstanding all of her objections thereto she craves a reversal thereof by reason of said errors in law.

MARTHA S. MUNSEY,
By her att'y, EDWARD A. LANE.

61 And on the same 23d day of July 1903 the court makes thereon the following order:

STATE OF NEW HAMPSHIRE:

Superior Court.

JULY 21, A. D. 1903.

Ordered that a writ of error issue according to foregoing petition and assignment of errors, upon the execution of a bond, with sufficient sureties in the sum of ($1500.) fifteen hundred dollars.

ROBERT M. WALLACE,
Chief Justice of the Superior Court of New Hampshire.

Filed July 23, 1903.

62 On the 8th day of September 1903 the plaintiff files in said superior court a bond of which the following is a true copy:

63 Know all men by these presents, that we, Martha S. Munsey of Pittsfield in the county of Merrimack and State of New Hampshire, as principal, and George W. Munsey, Frank D. Hutchins, William J. Brooks and Everett Jenkins all of said Pittsfield, as surities, are held and firmly bound unto M. Swain Clough of Concord in said county of Merrimack, sheriff of said county, or his successor in said office of sheriff, in the sum of fifteen hundred dollars *wo* which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 7th day of August in the year of our Lord one thousand nine hundred and three.

Whereas at the April 1903 term of the superior court of the State of New Hampshire held at said Concord in and for said county upon a *habeas corpus* proceeding pending in said court between State *ex-relatione* Martha S. Munsey and said M. Swain Clough a judgment was rendered against the said Martha S. Munsey, relator and whereas she has applied for a writ of error from the Supreme Court of the United States directed to said superior court to reverse said judgment.

Now therefore, the condition of this obligation is such, that if the said Martha S. Munsey shall prosecute her writ of error to effect, and shall appear in person before said superior court held in and for the county of Merrimack to answer to abide and perform any judgment adjudged against her in said proceeding and shall obey all orders of said superior court as to the disposition of her person

and shall not avoid then this obligation to be void otherwise to remain in full force and effect.

MARTHA S. MUNSEY. [L. S.]
GEORGE W. MUNSEY. [L. S.]
FRANK D. HUTCHINS. [L. S.]
WILLIAM J. BROOKS. [L. S.]
EVERETT JENKINS. [L. S.]

Witness:
EDWARD A. LANE.
ANNIE B. LANE.

Approved:
ROBERT M. WALLACE,
Chief Justice of the Superior Court of New Hampshire.

Filed Sept. 8, 1903.
A. J. SHURTLEFF, *Clerk.*

64 THE STATE OF NEW HAMPSHIRE, *Merrimack*, } ss:

[Seal Superior Court, New Hampshire.]

I, A. J. Shurtleff clerk of the superior court for said county, do certify that the foregoing is a true copy of the record and of all papers on file in said action.

In testimony whereof, I have hereunto set my hand and affixed the seal of said superior court, this sixth day of October A. D. 1903.

A. J. SHURTLEFF, *Clerk.*

I, Robert M. Wallace, chief justice of the superior court of the State of New Hampshire, certify that A. J. Shurtleff Esquire, whose signature is affixed to the foregoing certificate, is clerk of said superior court for the county of Merrimack, and hath the keeping of the files, records and proceedings of said court, and also of the files and records of the supreme judicial court, the court of common pleas, the superior court of judicature, the circuit court, and the supreme court, existing in this State prior to the first day of April, A. D. 1901, and is by law the proper person to make out and certify copies thereof, and that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation above written is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said superior court to be hereunto affixed, this sixth day of October A. D. 1903.

[Seal Superior Court, New Hampshire.]

ROBERT M. WALLACE,
Chief Justice.

65 On the same 8th. day of September 1903 the plaintiff files the following citation and return of service thereon.

[Seal Superior Court, New Hampshire.]

Attest: A. J. SHURTLEFF, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

To M. Swain Clough, sheriff, of Concord, in the county of Merrimack and State of New Hampshire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the superior court in and for the county of Merrimack and State of New Hampshire wherein Martha S. Munsey, of Pittsfield in said county is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert M. Wallace, chief justice of the superior court of the State of New Hampshire, this 8th day of September, in the year of our Lord one thousand nine hundred and three.

ROBERT M. WALLACE,
Chief Justice of the Superior Court of New Hampshire.

[Endorsed:] Filed Sept. 8, 1903.

67 On this 8th day of September, in the year of our Lord one thousand nine hundred and three, personally appeared Edward A. Lane before me, the subscriber, and makes oath that he delivered a true copy of the within citation to the within named M. Swain Clough, sheriff, defendant.

EDWARD A. LANE.

Sworn to and subscribed the 8th day of Sept. A. D. 1903.

EDMUND S. COOK,
Justice of the Peace.

Endorsed on cover: File No. 19,091. New Hampshire superior court. Term No. 126. Martha S. Munsey, plaintiff in error, *vs.* M. Swain Clough, sheriff of Merrimack county. Filed October 14th, 1903. File No. 19,091.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 126.

MARTHA S. MUNSEY, PLAINTIFF IN ERROR,

v.

M. SWAIN CLOUGH, SHERIFF OF MERRIMACK CO.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an extradition case and comes up on Writ of Error from the Superior Court of the State of New Hampshire.

The facts are as follows:

This plaintiff in error was arrested on March 3, 1902, by M. Swain Clough, the sheriff for the county of Merrimack, State of New Hampshire, upon a complaint and warrant, under Section 1, Chapter 263 of the Public Statutes of that state. Said section and the next two are as follows:

"SECTION 1. Whenever a person in this state is charged with an offense committed in another state, and is liable by the laws of the United States to be delivered over upon demand of the executive of such other state, any court of justice may, upon complaint on oath setting forth the offense and other matters necessary to bring the case within the law, issue a warrant to bring the person so charged before him or some other justice, to answer the complaint.

"SECT. 2. If upon examination there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the executive of this state, he shall, if charged with a capital offense, be committed to jail, there to be detained until a day so appointed as to allow a reasonable time to obtain the warrant of such executive.

"SECT. 3. If a person is charged with an offense not capital, the court or magistrate may order him to recognize, with sufficient sureties, to appear at a day so appointed, and, if he fails to recognize, may commit him to jail, there to be detained not exceeding thirty days, unless sooner discharged by due course of law."

On the same day requisition papers against her were filed with

the secretary of state and on the following day were laid before the governor of the state, Chester B. Jordan.

Counsel appeared for relator and also counsel for the State of Massachusetts, and the governor issued his rendition warrant addressed to the sheriff of Merrimack county, and said Clough took this relator on said warrant into his custody.

On the following day, March 5, she swore out a petition for writ of *habeas corpus*, a copy of which appears on pages 2 and 3 of the printed "Transcript of Record."

On March 8, Judge Charles F. Stone, to whom the petition was addressed, granted the writ, a copy of which appears on pages 2 and 3 of said record.

On March 15, the date named by Judge Stone for a hearing, said Clough made the following return on the back of the writ:

"STATE OF NEW HAMPSHIRE,

"*Merrimack, ss.*

"MARCH 15, 1902.

"*To Mr. Justice Stone:*

"I have here in court the within named Martha S. Munsey, who is now in my custody under a warrant from the governor of New Hampshire on the requisition of the governor of Massachusetts to arrest said Martha S. Munsey and deliver her to Jophanus H. Whitney, as the duly authorized agent of the Commonwealth of Massachusetts; and she has so been in my custody since March 4, 1902, when I received said warrant, a copy of which is hereto annexed.

"M. SWAIN CLOUGH, *Sheriff.*"

At said hearing counsel for relator introduced in evidence, subject to defendant's exception, the requisition papers and made a written motion that she be discharged upon the ground that by her arrest upon said rendition warrant she was deprived of her liberty without due process of law; that on the face of the documents submitted to the governor he was not authorized to issue his warrant and that the warrant was defective.

Copies of the rendition warrant and requisition papers, introduced in evidence, appear in said printed record, pages 6 to 11.

A copy of said motion also appears on pages 11 and 12.

The motion was denied *pro forma*, subject to relator's exception, and the case was transferred to 1902 term of the Supreme Court of the state.

On the 27th day of December, 1902, said court filed an opinion overruling said exception.

A copy of said opinion appears in said printed record, pages 12 to 22, inclusive.

An important paper in the case was known and treated as the Whitney affidavit, a copy of which is as follows:

"COMMONWEALTH OF MASSACHUSETTS,

"Middlesex, ss.

"I, Jophanus H. Whitney of Medford in the County of Middlesex and said Commonwealth, on oath depose and say that Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills as is more fully set forth in the papers hereto annexed, has fled from the limits of said Commonwealth and is a fugitive from justice.

"And I further depose that at the time of the commission of said crime she was in the state of Massachusetts in the county of Middlesex of said Commonwealth, and that at the same time and previous thereto she was a resident of Cambridge in the said county of Middlesex; that she fled from said Commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not now within the limits of the Commonwealth, but, as I have reason to believe, is now in Pittsfield in the State of New Hampshire.

"The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week, January last.

"JOPHANUS H. WHITNEY.

"Then personally appeared the above named Jophanus H. Whitney before me and made oath that the foregoing affidavit by him subscribed is true, this twenty-first day of February, A. D. 1902.

"WALTER C. WARDWELL,
"Justice of the Peace."

Relator's counsel urged that, as this affidavit showed that she fled Massachusetts prior to the date of the offense set forth in the third count in the indictment, she was not present in the state at that time, hence she was not a fugitive from justice as to that offense and could not legally be surrendered to be tried for it.

Relator's counsel also contended that as said affidavit showed her to have fled the state six years and some months subsequent to the alleged commission of the two separate offenses set forth in the first two counts of the indictment, prosecution for said offenses was barred by the statute of limitation of that state, Section 25, Chapter 213, Public Statutes of Massachusetts.

Consequently she was not a fugitive from justice as to the offenses set forth in said two counts because she could not be prosecuted for them at the time she left the state.

Said Section 25, Chapter 213, Public Statutes, reads as follows:

"An indictment for the crime of murder may be found at any period after the death of the person alleged to have been murdered.

"All other indictments shall be proved and filed within six years after the commission of the offense; but any period during which the party charged was not usually and publicly resident within this state shall not be reckoned as part of the six years."

As a result of the Supreme Court overruling the exception named above, the case again came up in the Superior Court on March 28, 1903, before Justice Stone for a further hearing.

At this hearing the relator, subject to the defendant's exception, introduced evidence from which it appeared that when her counsel appeared before Governor Jordan on said March 4, 1902, they stated that they desired a hearing before him before a warrant should be granted on the requisition papers; that counsel for the State of Massachusetts opposed this application on the ground that questions of fact should not be determined by the governor; that relator's counsel then renewed their claim that she was entitled to a hearing upon questions of fact, and in particular upon her claim that she was not a fugitive from justice; that it was pointed out to the governor, by her counsel, that she was already in custody for the purpose of securing her person with a view to extradition; but that the governor refused to hear *any* testimony upon any question of fact and, upon the advice of the attorney-general, issued his warrant upon the requisition papers without *other* testimony than that *contained in those papers.*

At this point the relator then introduced the requisition papers, upon which the rendition warrant was issued, subject to the defendant's exception.

The order of these papers was as follows:

First.—The requisition warrant.

Second.—The certificate of district attorney.

Third.—The certificate of secretary of state, that Albert Mason is chief justice of Superior Court, and Theodore C. Hurd, clerk, and that their signatures to the annexed papers are genuine.

Fourth.—The certificate of Chief Justice Mason to the official character of Clerk Hurd, his custody of the files and record of

the court, his right to certify copies and that his attestation to the annexed papers is in due form.

Fifth.—A copy of the indictment and of the record of its filing in court, verified by the clerk.

Sixth.—A copy of the *capias* writ for the arrest of relator with the return of Walter C. Wardwell, deputy sheriff, endorsed thereon to the effect that he had been unable to find her in his precinct.

Seventh.—A *copy* of the Whitney affidavit, so called, purporting to have been sworn to before Walter C. Wardwell, justice of the peace.

Eighth.—The final and last paper, accompanying the requisition warrant, which was the certificate of the clerk, reading as follows:

"COMMONWEALTH OF MASSACHUSETTS,

"*Middlesex, ss.*

"I, Theodore C. Hurd, clerk of the Superior Court within and for the county of Middlesex, do certify that the foreging papers, numbered one, two, and three, are true copies of the indictment pending in said Superior Court, of the *capias* issued thereon, with the return of the officer thereon, and also the affidavit of said officer filed in said case.

"In testimony whereof I hereunto set my hand and affix the seal of said Superior Court, this twenty-fourth day of February, A. D. 1902.

"THEO. C. HURD,
"*Clerk of Superior Court.*"

None of the foregoing requisition papers were numbered. No affidavit appeared in or among the papers, and no *copy* of one except that of the said Whitney affidavit.

There was no authentication or certification of the official character of Walter C. Wardwell as a justice of the peace before whom the Whitney affidavit purported to have been sworn.

The certificate of the district attorney was *not* under oath, nor was there any authentication, or certification among the papers, of his official character or authority.

The fact that relator was taken into custody on the rendition warrant, petitioned for writ of *habeas corpus* on the fifth and obtained a hearing on the fifteenth also appeared.

At the close of above evidence relator's counsel rested and moved her discharge, which motion was denied, subject to her exception.

She was then *ordered* by the court to proceed and introduce evidence on the question, whether she was in fact a fugitive from justice.

This relator's counsel declined to do on the ground it would constitute a waiver of her right to object to the refusal of the governor to grant her a hearing on this question of fact.

The court then *directed* that counsel state whether she waived the right to then, or at any future time, introduce further evidence upon this or any question of fact, and counsel for relator declared that she did waive that right.

The questions arising upon relator's motion and the foregoing exceptions were reserved, and the case was transferred to 1903 term of the Supreme Court of the state, and the action in the Superior Court was continued to the April term of the court.

On the second day of June, 1903, said court filed an opinion overruling relator's exception, and on the third day of July following, the order of the court was certified to the Superior Court for the county of Merrimack, and on the same day relator filed her objections in said Superior Court to any judgment against her, whereupon judgment was rendered, however, for the defendant.

Your relator then moved for a stay of proceedings pending her application for writ of error.

All the foregoing, including a copy of the opinion of the Supreme Court, appears in detail in said printed record, pages 23 to 32, inclusive.

Subsequently your relator presented a petition containing a statement of the case, and an "assignment of errors," to the chief justice of the Superior Court of the state. Upon which he made the following order:

"Ordered that a writ of error issue according to foregoing petition and assignment of errors upon the execution of a bond with sufficient sureties in the sum of ($1,500) fifteen hundred dollars.

"ROBERT M. WALLACE,

"*Chief Justice of the Superior Court of New Hampshire.*"

The foregoing petition and order thereon were filed in the Superior Court on the twenty-third day of July, 1903, and on September 8th a bond was filed in accordance with above order, and a writ of error was issued and allowed by said chief justice, and citation was served on said M. Swain Clough, sheriff for the county of Merrimack. All which appears in full in said printed record, pages 33 to 41, inclusive, except the writ of error, a copy of which is found on page 1 of said record.

The petition for the writ of *habeas corpus*, which was issued in this case, reads as follows:

"To Hon Charles F. Stone, justice of the Superior Court:

"Respectfully represents your petitioner, Martha S. Munsey, that she is at Concord, in our county of Merrimack, illegally restrained of her liberty by M. Swain Clough, sheriff of the county of Merrimack, who claims to hold your petitioner by virtue of an arrest made in pursuance of an executive warrant issued by the governor of the state of New Hampshire on a requisition from the governor of Massachusetts, reciting that your petitioner stands charged by indictment in said latter state with the crime of uttering forged wills committed in the county of Middlesex on the twenty-eighth day of February, A. D. 1895; on the seventeenth day of May, A. D. 1895, and on the twentieth day of November, A. D. 1901, and was a fugitive from the justice of the latter state.

"Your petitioner avers that she is illegally restrained of her liberty because the proceedings and process upon which the executive warrant was issued by the governor of the state of New Hampshire, are irregular and defective and the evidence filed in support thereof is insufficient, the documentary evidence contradictory and, assuming all the evidence to be true, is not sufficient to warrant the extradition of your petitioner.

"Second. That upon the proceedings filed in the application to the governor upon which the warrant was issued, it appears, and upon evidence to be submitted to a court in a hearing upon the writ of *habeas corpus* prayed for in this petition, it will also conclusively appear that your petitioner is not a 'fugitive from justice' within the meaning of that term as used in the constitution and the acts of Congress relating thereto.

"Third. That your petitioner is not a 'fugitive from justice.'

"Fourth. Because the governor of the state of New Hampshire upon the hearing on the application for the issue of said executive warrant, declined and refused to hear or consider any evidence from your petitioner, or in behalf of your petitioner, upon the question of whether she was a 'fugitive from justice,' or upon any other question, and ruled that the only evidence which he would consider and upon which he based the issuance of said warrant was the documentary evidence offered and filed in support of the requisition made by the governor of Massachusetts.

"Fifth. Because the only evidence considered by the governor of the state of New Hampshire, upon which he issued the warrant on the aforesaid requisition was documentary evidence

filed in support of the requisition of the governor of the Commonwealth of Massachusetts and because he refused and declined to hear any evidence, either documentary or oral, offered in behalf of your petitioner.

"Wherefore your petitioner prays for a writ of *habeas corpus* and that the same may issue to said M. Swain Clough, ordering him to have the body of your petitioner before your honor that she may be released from restraint and granted her liberty, and for such other relief as may be just.

"MARTHA S. MUNSEY.

"MERRIMACK, *ss.*

"MARCH 5, 1902.

"Subscribed and sworn to before me,

"EDWARD A. LANE,

"*Justice of the Peace.*"

SPECIFICATION OF ERRORS.

The following is a specification of the errors claimed and relied upon:

First, That it was error in law to hold that the record evidence, submitted to the governor, justified the issue of his rendition warrant, as it failed to show your relator a fugitive from justice as to *all* the crimes with which she was charged in the indictment on which the extradition proceeding was based, and for which she was demanded.

Second, That it was error in law to hold that the evidence contained in the requisition papers, submitted to the governor, legally authorized a finding by him that your relator was a fugitive from justice as to any one of the crimes with which she was charged in said indictment, and for which she was demanded, and that the rendition warrant was legally issued.

Third, That it was error in law to hold that the documentary, or record evidence, submitted to the governor was competent to be considered by him on the question whether your relator was a "fugitive from justice."

Fourth, That it was error in law to hold that your relator could not be heard, as a matter of right, before the governor, under the circumstance in which she appeared before him, and that his refusal to hear her deprived her of no legal right which she then possessed, and that the governor was authorized to refuse her a hearing and issue his rendition warrant.

Fifth, That all the foregoing holdings of law and the judgment of the Superior Court of New Hampshire, rendered in pursuance thereof, violated the constitutional rights of your relator.

BRIEF OF THE ARGUMENT.

THE RECORD EVIDENCE FAILED TO SHOW THIS RELATOR A FUGITIVE FROM JUSTICE AS TO ALL OF THE SEVERAL CRIMES WITH WHICH SHE WAS CHARGED, HENCE THE RENDITION WARRANT WAS ILLEGALLY ISSUED.

It appeared from the purported copy of the Whitney affidavit, submitted to Governor Jordan by the demanding state, that relator left the state some twenty days before the third offense was alleged to be committed by her, hence, upon the showing of the demanding state, relator was only constructively present in that state at date of said alleged offense. That a person cannot be a fugitive from justice when not personally present in the state where the offense is alleged to be committed, appears to be well settled doctrine. *State of North Carolina* v. *Hall*, 28 Lawyer's Reports, Annotated, 289, and cases there collected; also *People* v. *Hyatt*, 172 N. Y. 176. This doctrine is sanctioned by the New Hampshire court in this case.

As Massachusetts failed to show relator to be a fugitive from justice as to the three offenses alleged to be committed by her, it is not entitled to ask New Hampshire to comply with its demand that it be allowed to take relator there to try her for said three offenses.

A demand that relator be surrendered to be tried and punished for three offenses is not a demand that she be surrendered to be tried and punished for two.

The nature and character of the demand for relator is such that it must be met in its entirety or not at all; Massachusetts did not invoke this process in order to obtain possession of relator to try her for two offenses alleged to be committed, but for three; the rendition warrant issued in legal effect authorized her forcible return for that purpose.

If by this process your relator was extradited to be tried solely for the two crimes alleged to be committed in 1895, then assuming she was a fugitive from justice as to said two, she would have no cause of complaint, but this extradition proceeding was not instituted with any such end in view.

A compliance with this demand recognizes its purpose and object, and deprives this relator of her legal right not to be sent to Massachusetts to be tried for the offense alleged to be committed in November, 1901.

If it were conceded that the object of this process was to take this relator forcibly to Massachusetts, with no ulterior end in view, her extradition would be instantly denied, because there would be no basis for it under Clause 2, Section 2, Article IV, of the Constitution of the United States.

The removal of this relator under this process is a mere incident to the purpose and object of her removal, which is her trial for said three alleged crimes.

The charge, the evidence of fleeing, and the demand, are essential factors in the proceeding; but the process cannot be invoked except for the constitutional object of trying and punishing relator for the particular crimes with which she is shown in such proceeding to be charged.

All the cases appear to go on the assumption that such is the real intent, and a demanded state requires no proof beyond the fact that the demanding state has duly charged relator with the crime or crimes and is seeking his extradition.

In the case at bar, as in all cases of extradition, the purpose of the demanding state to try relator for the *crimes charged* underlies the use of this process.

It is impossible to comply with this demand in part. If surrendered at all, relator must be surrendered in order that she may be put on trial for these three offenses.

If it were possible to divide this demand, or to comply with it in part, to stipulate that New Hampshire should send relator to Massachusetts to be tried for two only of the crimes charged, then, on the assumption that she was a fugitive from justice as to said two crimes, there would appear to be support for the claim that it would be the duty of New Hampshire to send relator there for such trial; but the demand cannot be divided, and it cannot be complied with in part. It must be met in full or declined absolutely.

New Hampshire has no power to stipulate that relator shall be tried for two crimes only, nor to stipulate for her return to New Hampshire after such trial, before she is tried for the third.

Relator has the right to insist upon the protection of the demanded state until it becomes the duty of such state to comply with the demand of the demanding state, and it cannot become a duty to comply with a demand to surrender one of its citizens

to be tried for three offenses until such citizen is shown to be a fugitive from justice as to all three.

It is idle to argue that it is the purpose of Massachusetts to try this relator for only the two crimes charged to have been committed by her in 1895, because the authenticated copy of the indictment which accompanied the demand of the governor shows that she was indicted for the third offense as well as for the other two, and that the three were covered by one indictment. This settles the question of the *intent* attending her extradition.

If it could properly be said that Massachusetts did not ask for her return in order to try her for the offense alleged to be committed in 1901, then it could also be said that it did not ask for her return in order to try her for the two offenses alleged to be committed in 1895, hence it would not be seeking to extradite her for the purpose of a trial at all.

Let us examine the ground on which the New Hampshire court attempts on the foregoing facts to sustain the issue of the rendition warrant.

The language of Justice Walker, who rendered the opinion, is as follows: "But the fact, if it be one, that the relator departed from the demanding state before the commission of one crime alleged in the indictment for which alone she could not be extradited, suggests no reason why she could not legally be returned for other crimes alleged to have been committed there before she left."

It is not our contention that relator cannot be extradited for crimes alleged to be committed in Massachusetts before she left there. On the contrary, we agree with the New Hampshire court that she can be, if as to them she is a "fugitive from justice;" but we urge that the demanding state cannot demand that relator be delivered up to be tried for three crimes until it establishes the fact that she is a fugitive from justice as to those three crimes. In other words, we urge that Massachusetts is not seeking to extradite this relator for the alleged commission of two crimes as to which she may be a fugitive from justice, but is also seeking in this proceeding to extradite her for a crime as to which it is admitted she is not such fugitive, and hence cannot be extradited.

Continuing, Justice Walker says: "The liability that she may be tried on the last count alone, does not exclude her from the class of persons made liable to extradition by the Federal Constitution. She is still 'a person * * * charged with * * * crime.' The question is not whether the governor

might decline to extradite her for that reason, or because he believed the demand was not made in good faith, but whether her rights of citizenship are infringed by her rendition to answer to such an indictment. Neither the constitution nor the statutes upon the subject make an exception of that character. *Lascelles* v. *Georgia,* 148 U. S. 537, 542, 547; *Commonwealth* v. *Wright,* 158 Mass. 149."

Nevertheless, we urge that her rendition to answer to an indictment, charging *crimes* as to which she is *not* a "fugitive from justice," does infringe her right of citizenship, and that neither the constitution nor the statutes authorize such rendition.

The above two cases cited by the court are not in point.

In both cases accused had already been extradited, and the question was, whether the constitution and the statute on the subject secured to him a right to return as against the claim of the state to detain him to answer for other crimes. The court simply held that such right was not secured to him, but it did not hold that a man could be charged with half a dozen offenses in one indictment, and, without infringing his right of citizenship, be extradited to answer to them all, upon evidence that as to one of them only was he a "fugitive from justice."

The opinion on this branch of the case closes by the use of the following language: "If the indictment upon which this proceeding is based had contained only the first count, but it appeared that another indictment containing the other counts was pending in the same court, that fact would not prevent the rendition of the prisoner, though the question in legal effect would be substantially the same as is presented here."

We dissent from the proposition "though the question in legal effect would be substantially the same as is presented here," because the court assumes that if this relator had been indicted for only the one offense alleged to be committed in February, 1895, and was shown to be a "fugitive from justice" as to that offense, the question of her extradition would, in legal effect, be the same as that now presented, whereas a *vital* difference exists. In the *assumed* case, she is shown to be a fugitive from justice as to the offense for which she is indicted and demanded, while in the case at bar the demanding state *fails* to furnish evidence that she is a fugitive from justice as to all of the several offenses for which it indicts and seeks to extradite her.

In above illustration it is assumed that another indictment containing the other counts is pending in the demanding state

in the same court; but how can that have any bearing on the question?

If there were now another indictment pending in the same court in Massachusetts against this relator for other crimes alleged to be committed there, as to which it were admitted she was not a fugitive from justice, what bearing could that fact have, either one way or the other, on the question now before the court?

Neither the purpose of this process nor the nature of the demand made is altered by the success or non-success of the demanding state in maintaining the affirmative of the issue, that as to all the crimes charged relator is a "fugitive from justice."

Since in the case at bar the provisions of Article IV, Section 2, of the Constitution of the United States do not secure to relator a right to return after she is tried for the first two crimes charged, and before she can be tried for the third, it is especially incumbent on New Hampshire not to comply with the demand that she be surrendered to be tried for each and all of the crimes charged until she is shown to be a "fugitive from justice" as to each and all.

In commenting on the case of *Lascelles* v. *Georgia,* 148 U. S. 537, the court in *People* v. *Hyatt,* 172 N. Y. 182, say:

"It was there held that interstate rendition did not depend on comity or contract, but on the provisions of the Constitution of the United States.

"It will then be seen that the condition of a citizen of one state surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering state is without any standing to intervene in his behalf, however much its process may be abused.

"Therefore, it necessarily follows that no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity, is not possessed by the states."

A construction of Clause 2, Section 2, Article IV, of the Constitution of the United States which should require this relator to be surrendered up, under the circumstances of this case, relieves the demanding state of the burden thrown upon it by the express language of said Clause 2, namely: The burden of showing relator to be a "fugitive from justice" as to the *crimes* which it charges against her.

By setting up these three offenses in one indictment and ask-

ing New Hampshire to send relator there to answer to them all, Massachusetts elected to treat her as a fugitive from justice as to them all, and having elected its position, it must stand or fall accordingly.

It is true Section 2, Article IV, of the Constitution of the United States, does not provide for the return of accused, after extradition before trial for another offense than the one for which he was extradited, but it is also true that said provison was not intended to deprive him of his right to remain unmolested in the demanded state on account of an alleged offense as to which he was *not* a fugitive from justice. It was not intended to enable the demanding state to join in one indictment a count for such non-extraditable offense with a count for another as to which accused was such fugitive and thereby demand and compel his return to answer to both counts in one trial.

Neither was said constitutional provision intended to embarrass one in his defense to the charge of being a fugitive from justice by enabling the demanding state to join said two counts in one indictment, and thereby create, at the extradition hearing, two issues instead of one, the holding of either against accused resulting in his extradition to answer to both counts.

According to the view of the Supreme Court of New Hampshire, the question presented to Governor Jordan was, Is this relator a fugitive from justice as to *any one* of the different offenses charged in this indictment?

An affirmative answer to same required him to issue his rendition warrant.

Whereas the true question was, Is this relator a fugitive from justice as to *all* the offenses charged, for which she is demanded for trial?

Thus raising one issue instead of several.

The constitutional provision and the statutes on the subject authorize the governor to issue his rendition warrant only when accused is shown to be a fugitive from justice as to the offenses charged in such extradition proceeding; therefore, is it not clear that his authority is exceeded when he issues a warrant for the return of accused to be tried for a crime as to which it is admitted he is not such fugitive?

It should be borne in mind that it is not sufficient to show that accused has fled the state as to some crime, but that he has fled the state on account of the *particular crimes* with which he is shown, in the extradition proceeding, to be charged and for which he is demanded for trial.

The executive of the demanding state cannot legally ask that its demand be granted until it is first shown that accused is a fugitive from justice as to the crimes for which he is so demanded; therefore, if the state's demand is pressed, that accused be surrendered to be tried for two offenses when it appears that he is a fugitive from justice as to one only, the effect is to ask the governor of the demanded state to *exceed* his authority.

Let us refer again to the language of the court in discussing this branch of the case:

"If the indictment, upon which this proceeding is based, had contained only the first count, but it appeared that another indictment containing the other counts was pending in the same court, the question in legal effect would be substantially the same as is presented here."

We submit that the question in legal effect would not, and could not, be substantially the same as that presented here, because in above illustration the indictment used as the basis for the proceeding would *not* contain the count in question, viz.: the count for the offense alleged to be committed November 20, 1901, but only the count for the offense alleged to be committed February 28, 1895.

The process of extradition must rest *entirely* upon the indictment on which it is based, and can have no connection with another indictment, even though the latter be pending in the same court of the demanding state.

When one indictment is used as the basis of the extradition proceeding, evidence of the pendency of another in the same court cannot be received by the governor of the demanded state.

In above illustration used by Justice Walker, relator, if extradited at all, is legally extradited to answer to the indictment containing the one count, as that indictment is the one used as the basis for the extradition process against her.

She could not, and would not, be extradited to answer to any other. We frankly admit that when accused is once shown to be a fugitive from justice as to the crime charged in the particular indictment used as the basis of his extradition, it cannot be shown in evidence, as a cause for not surrendering him to answer to said indictment, that still another is pending in the same court charging a crime as to which he is *not* such fugitive.

This must be so because accused would not, in the eye of the law, be extradited to answer to any offense except that charged in the particular indictment used as the basis of his extradition.

It must also follow that when accused is *not* shown to be a

fugitive from justice as to the one crime charged against him, it cannot be urged as a cause for his removal, nor shown in evidence, that another indictment is pending in the same court charging a crime as to which he is such fugitive.

This must be so for two reasons. First, because the latter indictment, though pending in the same court, is not used as the basis of his extradition. Second, if it were so used, the same legal question would be presented as is presented in the case at bar, accused though shown to be charged with two crimes would be shown to be a fugitive from justice as to one only.

We close the discussion of this branch of the case with the additional suggestion that the record evidence in this case, for the reasons hereafter urged, failed to show this relator a fugitive from justice as to either of the first two crimes charged in the first two counts in the indictment, consequently the demanding state failed to show her a fugitive from justice as to *all* of the several crimes with which it charged her in its indictment, and the rendition warrant was illegally issued.

THE EVIDENCE CONTAINED IN THE REQUISITION PAPERS DID NOT AUTHORIZE A FINDING BY THE GOVERNOR THAT THIS RELATOR WAS A FUGITIVE FROM JUSTICE AS TO ANY ONE OF THE THREE CRIMES CHARGED AGAINST HER, CONSEQUENTLY THE RENDITION WARRANT WAS ILLEGALLY ISSUED.

The record evidence bearing on the question of whether relator was a fugitive from justice was embraced in the so-called "Whitney affidavit," which in full is as follows:

"COMMONWEALTH OF MASSACHUSETTS, ..
"*Middlesex, ss.*

"I, Jophanus H. Whitney of Medford, in the county of Middlesex and said commonwealth, on oath depose and say that Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills, as is more fully set forth in the papers hereto annexed, has fled from the limits of said commonwealth and is a fugitive from justice. And I further depose that at the time of the commission of said crime she was in the state of Massachusetts, in the county of Middlesex of said commonwealth, and that at the same time and previous thereto, she was a resident of Cambridge, in the said county of Middlesex; that she fled from said commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not

now within the limits of the commonwealth, but, as I have reason to believe, is now in Pittsfield, in the state of New Hampshire. The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week of January last.

"JOPHANUS H. WHITNEY.

"Then personally appeared the above named Jophanus H. Whitney before me, and made oath that the foregoing affidavit by him subscribed is true, this twenty-first day of February, A. D., 1902.

"WALTER C. WARDWELL,
"Justice of the Peace."

The above affidavit was not evidence that she was a fugitive from justice as to the offense charged in the third and last count in the indictment, for the reason already fully stated.

It also was not evidence that she was such "fugitive" as to the separate offenses charged in the first two counts.

This affidavit begins by asserting,

"That Martha S. Munsey * * * has fled from the limits of said commonwealth and is a fugitive from justice." Here is a statement of fact followed by a conclusion of law.

If the affidavit had stopped there it would have been somewhat analogous to the one in *Ex parte Reggel*, 114 U. S. 642, 647, but affiant proceeds to state the facts upon which his conclusion rests.

"And I further depose that at the time of the commission of *said crime* she was in the state of Massachusetts, in the county of Middlesex of said commonwealth, and at the same time and *previous thereto* she was a resident of Cambridge, in the said county of Middlesex; that she fled from said commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901."

From the foregoing it appears that the words "said crime" refer to the "crime of uttering forged wills, as is more fully set forth in the papers hereto annexed."

It also appears that "at same time and *previous* thereto," viz.: when uttering said forged wills, "she was a resident of Cambridge, in the said county of Middlesex."

In other words, at the time of the alleged commission of each crime, and previous to each, she was a resident of said Cambridge.

At this point, however, affiant negatives the idea that relator

was personally in said county of Middlesex on November 20, A. D. 1901, by using the following language:

"That she fled from said commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901."

Affiant evidently considered that relator's departure from the state on or about the fourth did not necessarily deprive her on the twentieth of her legal status as resident of said Cambridge.

Here, then, we have unequivocal evidence from the demanding state that this relator was a resident of that state at the time of the alleged commission of the first two crimes charged, and so continued until November, 1901, when she fled the state.

The statute of limitation in force in Massachusetts in November, 1901, reads as follows:

"An indictment for the crime of murder may be found at any period after the death of the person alleged to have been murdered. All other indictments shall be found and filed within six years after the commission of the offense; but any period during which the party charged was not usually and publicly resident within the state shall not be part of the six years." Public Statutes of Massachusetts, Chapter 213, Section 25.

As in November, 1901, prosecution was barred, she could not be a "fugitive from justice" as to said two crimes, because she was not "charged with crime" within the meaning of the clause of the Federal Constitution providing for extradition (U. S. Const., Article IV, Section 2), which is always interpreted as requiring a *lawful charge of crime punishable by the law of the demanding state.*

The statute of limitation in criminal actions is not a matter of defense in Massachusetts; it is a part of the affirmative case of the prosecution to prove that the offense is not outlawed.

If an indictment should allege an offense committed more than six years before the date of the indictment, without an allegation of non-residence during the intervening period, it would be bad on demurrer, but Justice Walker, in delivering the opinion of the Supreme Court of New Hampshire, says:

"It," referring to the Whitney affidavit, "does not necessarily establish the proposition as claimed by her that during all that time she was 'usually and publicly resident' (Mass. P. S., Chapter 213, Section 25) in the state, if it did it would become necessary to consider the question whether under those circumstances she could be a fugitive from justice within the meaning of the law of extradition."

The answer to above is, that as the affidavit was direct evidence that she was a resident of Cambridge, Massachusetts, the

necessary presumption was that she was "usually and publicly" a resident thereof, hence, the bar of the statute applied.

In other words, it was not necessary, in order to raise the bar of the statute, for the state's evidence to preclude the *possibility* that relator was not, during the term of her residence in Cambridge, a usual and public resident thereof, because the evidence having on its face established her residence there, and the term thereof, the bar of the statute was raised unless the character of her residence was such as to bring it within an exception named in the statute, and as that did not appear, the statute applied.

The Whitney affidavit was *prima facie* evidence that she was, after the alleged commission of said two crimes, a resident of Cambridge for six years and several months prior to November, 1901.

On the facts disclosed the statute applied because the affidavit of Whitney brought the case within its general terms and did not negative its operation by any evidence that the case fell within an exception thereto.

But there seems to be a suggestion in the opinion rendered by the Supreme Court of New Hampshire that the Whitney affidavit did not furnish *prima facie* evidence that relator was entitled to the protection of the statute because affiant swore that relator was a "fugitive from justice."

We submit that the question of the residence of this relator in Massachusetts from February, A. D. 1895, to November, 1901, and its character, is not determined by the isolated expression of a legal conclusion in this affidavit, but upon a fair consideration of all that appears therein.

Affiant starts out with above conclusion, and then states the facts upon which it rests.

The legal conclusion does not control the facts, but the facts the conclusion.

In other words, the legal conclusion rests on the facts and not the facts on the conclusion, and in this case the latter is not *supported* by the former.

It must not be forgotten that the affidavit in this case was not offered by this relator to show she was *not* a fugitive from justice, but was offered by the demanding state to show she *was*.

The situation was this: The state attempted to prove that this relator in November, 1901, fled to escape from a prosecution to which she was then legally subject because of the alleged commission of the two crimes named in the first two counts in the indictment; but its evidence failed to prove her legally

subject to said prosecution because of the statute of limitation. The fact that the statute contained within itself an exception to its operation was immaterial because no evidence was offered by the state to bring the case within the exception.

The question presented to the governor was, Was this relator a fugitive from justice as to said two crimes when she is alleged to have "fled"?

She was such fugitive if she was then subject to prosecution therefor, otherwise not; hence, in view of the statute of limitation the answer to above question turned on the query, Does this affidavit afford any evidence that said statute was not operative in this case? In other words, does it appear that during any portion of the period following the alleged commission of said two crimes, and ending in November, 1901, this relator was *not* usually and publicly a resident of Cambridge, Massachusetts?

There was no such evidence, consequently the finding made, that relator was such fugitive, was not supported by the evidence.

We desire to call the attention of the court to the criminal statute of limitation in New Hampshire, which is in line with that of Massachusetts, and is as follows:

"Indictments and prosecutions for offenses punishable by fine not exceeding one hundred dollars, or by imprisonment not exceeding six months, shall be found or begun within one year, and all other information and indictments, except for treason, murder, rape, arson, robbery or burglary, shall be filed or found within six years after the offense is committed; but the time during which the party charged was not usually and publicly resident within this state, shall not be reckoned as part of the time aforesaid." Public Statutes of New Hampshire, Chapter 253, Section 14.

For decisions thereon see *State* v. *Nashua & Lowell R. R.*, 58 N. H. 182; *State* v. *Havey*, 58 N. H. 377, 380; *State* v. *Ingalls*, 59 N. H. 88; *State* v. *Caverly*, 51 N. H. 446.

On the point that concealing a crime will not prevent the running of the statute, see *State* v. *Nute*, 63 N. H., 80, opinion by Allen.

We close this branch of the case with the final suggestion that the Whitney affidavit was offered to prove, among other things, that although relator was charged with crimes committed more than six years apart, yet that prosecution for any of the crimes was not barred because the statute of limitation did not run against such prosecution, but as it failed to establish

that fact it failed to show relator a fugitive from justice as to all of the several crimes charged.

As, on the evidence, she did not leave the state for more than six years after the alleged commission of the first two crimes, it was encumbent on the state to prove that the statute did *not* run in order to show her a fugitive from justice as to said crimes.

In other words it was incumbent on the state to prove that she was not usually and publicly a resident of Cambridge, Massachusetts, and not for her to prove that she was.

IT WAS ERROR IN LAW TO HOLD THAT THE EVIDENCE SUBMITTED TO THE GOVERNOR WAS COMPETENT TO BE CONSIDERED BY HIM ON THE QUESTION OF WHETHER THIS RELATOR WAS A "FUGITIVE FROM JUSTICE."

The so-called *copy* of an affidavit which accompanied the requisition papers was incompetent evidence to be considered by the governor on the question whether relator was a fugitive from justice.

If a foreign affidavit was admissible evidence it should have been produced, as it was the best evidence.

It being in the possession of the demandant state, which relied upon it to establish its claim that relator was a "fugitive from justice," it should have been produced, and relator had a right to insist upon it.

No reason appears, or is offered, for substituting a copy for the original. By this action relator was deprived of her legal right to inspect the original, and to prove, if within her power, that the signature of affiant and the person, before whom it purported to be executed, were not genuine.

An examination of the statutes of New Hampshire, as well as the statutes of the United States, show that no statute exists authorizing the use of this *copy* as evidence in case like this.

This copy was among, but not one of, the documents accompanying the requisition of the governor of Massachusetts which he certified to be authentic and duly authenticated.

Let us examine the language of the requisition warrant on this point. "Whereas it appears by *certain* documents, which are hereunto annexed, and which I certify to be authentic and duly authenticated, in accordance with the laws of this commonwealth, that Martha S. Munsey stands charged with the crime of uttering forged wills."

Omitting the relative clauses, the quoted language stands as

follows: "It appears by certain documents that Martha S. Munsey stands charged with the crime of uttering forged wills."

The relative clauses point out that said *certain* documents, which *prove* the existence of the charge, are annexed, are authentic and have been duly authenticated in accordance with the law of Massachusetts.

It is apparent on examination that this *copy* of an affidavit does not prove the existence of the charge against Martha S. Munsey, but merely refers to annexed papers which do.

Said copy is one of the papers annexed to the requisition warrant, but so is the certificate of George A. Sanderson, which is not certified to be authentic, or intended to be so certified by the language quoted.

We quote from the printed record, page 27, as follows:

"The certificate of the district attorney is not under oath, nor is there any authentication, or certification among the papers, of his official character or authority."

In using above language in his requisition warrant the governor intended to discharge the duty imposed on him by Section 5278 of the Revised Statutes of the United States, and its meaning should be construed in the light of the duty to be performed.

Furthermore, as the authority of the governor to authenticate was based on said Section 5278, and did not extend beyond the power there given, he had no authority to authenticate this copy.

Is it not plain that its original, if such exists, must be on file either in the office of the secretary of state for the state of Massachusetts or in the office of the clerk of the Superior Court in and for the county of Middlesex, in said state?

In either case it was the duty of the person in whose care and custody is the original, to verify the copy in any case in which the latter can be used.

It will not be claimed that the secretary of state verified this copy in any manner.

Neither can it be claimed that the governor verified it, because he expressly pointed out which of the documents annexed to his requisition warrant he intended to verify, and did verify.

We again refer to his language: "Whereas it appears by *certain* documents which are hereunto annexed, and which I certify to be authentic and duly authenticated, in accordance with the laws of this commonwealth." Note the language, "Which I certify to be authentic and *duly authenticated*."

Which of the annexed documents are "duly authenticated"?

Certainly not the certificate of Mr. Sanderson nor this copy of an affidavit.

We quote from page 26 of the printed record, as follows:

"Then follows a certificate of Chief Justice Mason to the official character of the clerk, Hurd, his custody of the files and records of the court, his right to certify copies of such files and records, and that his attestation to the annexed papers is in due form."

In order to learn which of the annexed papers are "duly authenticated" let us now turn to the certificate of Clerk Hurd, which is as follows: "I, Theodore C. Hurd, clerk of the Superior Court within and for the county of Middlesex, do certify that the foregoing papers, numbered one, two and three, are true copies of the indictment pending in said Superior Court, of the *capias* issued thereon, with the return of the officer thereon, and also the affidavit of said officer filed in said case.

"In testimony whereof I hereunto set my hand and affix the seal of said Superior Court, this twenty-fourth day of February, A. D. 1902.

"THEO. C. HURD,
"Clerk of Superior Court."

This certificate leads one to inquire what officer made the return on the *capias* writ, because after referring to the return of the officer thereon the clerk adds, "And also the affidavit of said officer filed in said case." On said page 26 of the printed case we find the following: "The next paper is a copy of the *capias* writ for the arrest of the relator, with the return of Walter C. Wardwell, deputy sheriff, endorsed thereon, to the effect that he has been unable to find her in his precinct."

This examination demonstrates the fact that the clerk attempted to verify a copy of the affidavit of Walter C. Wardwell, but the following from said page 26: "The only copy of an affidavit contained in the papers is that of Jophanus H. Whitney," proves that a copy of an affidavit by Wardwell, if such existed, did not accompany the requisition warrant.

It is reasonable to suppose if Wardwell made an affidavit it was to the truth of his return on the *capias* writ.

From all the foregoing it is apparent that a claim that Clerk Hurd verified the Whitney copy as a true copy of the original, or that it was in any manner "duly authenticated," cannot be sustained.

The fact is that no officer in whose care and custody is the original, verified the copy.

Our claim is that an unverified copy of a foreign affidavit was not competent evidence for the demanded governor to consider

on the question of fact whether this relator was a fugitive from justice.

We suggest in passing that if this original were on file in said Superior Court and the copy had been specially certified as a true one by Clerk Hurd, even then it would not have been competent evidence for the demanded governor to consider on the question of "flight," so far as the authentications of Hurd was concerned, because an affidavit filed in court in a proceeding in which the court did not *have* jurisdiction of relator's person could not be such a court record as would entitle a certified copy thereof to be used in another state as evidence against relator in a matter affecting his personal liberty. The original affidavit so on file in the office of Clerk Hurd would not constitute such a judicial proceeding, or any part of such a judicial proceeding, nor such part of the record of the court as is contemplated by Section 1, Article IV, of the Constitution of the United States. *Baltimore etc. R. Co.* v. *Trustee, etc.*, 91 U. S. 127-130; *Roanoke Land etc. Co.* v. *Hickson*, 80 Va. 589-591; *D'Arcy* v. *Ketchum*, 11 (Howard) U. S. 165.

But assuming, as the Supreme Court of New Hampshire does assume, that this copy is a copy of "the sworn proof required by the statute of Massachusetts to be there filed with the governor," the question before the court is, Can an unverified, unauthenticated copy of a piece of evidence, on file in an executive proceeding in another state to which relator was in no way a party, be competent evidence against him in a matter affecting his personal liberty?

We submit that the affirmative of this proposition cannot be matched in any case bearing on the question of the competency of evidence in the judicial history of this country.

In addition to the foregoing reasons we urge that this copy was not competent evidence before the demanded governor because its original would not, for the following reasons, have been competent:

First, This copy shows its original was not under the seal of any court nor of any notary public, and the authority of the justice of the peace, before whom the original purported to have been executed, was in no way authenticated.

Second, The oath administered in the original affidavit was not administered under such circumstances as carried with it in the extradition proceeding before the demanded governor the penal consequences of false swearing.

The original was not used before the demanded governor, and evidently was not taken *to be so used*, and the actual use of a

mere unverified, unauthenticated copy could not subject affiant in any state to the penal consequences of false swearing. Had the original been so used it could not have subjected affiant in New Hampshire to the penal consequences of false swearing because the oath was not administered in that state, but in Massachusetts by one purporting to be a justice of the peace of the latter state. *Gibson* v. *Tilton*, 17 American Decisions 306.

THE COPY OF INDICTMENT WAS NOT COMPETENT EVIDENCE.

We contend that the authenticated copy of the indictment was also incompetent evidence before the demanded governor on the question of whether relator was a "fugitive from justice."

This copy proved that the *charge* of crime existed because Section 5278, Revised Statutes of the United States, provided that it should have that effect, but it proved nothing more.

None of the grand jury had personal knowledge of any facts set forth in the indictment. How, then, could a *copy* thereof be competent evidence of such facts?

If the indictment, when found, is not evidence of the facts it alleges when those facts are directly in issue (and this will not be denied) how in a foreign state can a copy thereof be evidence of facts alleged therein which are not admitted and which bear on the question of personal liberty of accused?

It may be urged in answer that the governor, having authenticated the copy of the indictment, the facts therein are established.

The fallacy of this answer consists in the false assumption that the allegations in the indictment are proved by said authenticated copy. The only fact established is the existence and character of the *charge* of crime.

As the demanded state has not jurisdiction to determine the truth or falsity of the charge, evidence offered for the *purpose* of proving either is not admissible on *habeas corpus*.

It is not the *guilty* person charged with crime who may be demanded, but the *person* charged with crime, whether guilty or innocent, provided he has fled from prosecution.

As suggested Section 5278, Revised Statutes of the United States, provided that the authenticated copy of the indictment should have the effect of proving the nature and existence of the charge of crime, but it provided and intended nothing more. How then can such authenticated copy have a greater effect as evidence than the statute intended which created it a piece of evidence?

In the case of *ex parte* Swearingen, 13 South Carolina, the court, in discussing the question whether the fact that relator was a "fugitive from justice," should be made to appear to the demanded governor before the issue of the rendition warrant, on page 79, uses the following language:

"If, therefore, it is necessary that such fact shall be made to appear, it certainly is not essential that it shall be proven by an *affidavit certified by the governor of the state making the de*mand as authentic. Indeed, the governor's authentication of such an affidavit would have no force and effect here, as that is not the mode prescribed by law for the authentication of the records and judicial proceeding of another state, and the only reason why the governor's authentication of the indictment or affidavit showing that the person demanded is charged with crime is sufficient, is that it is expressly so provided by the act of 1793. It follows, therefore, that if the fact that the person demanded is a fugitive from justice must be proven, it must be by some evidence other than that which would be furnished by an affidavit authenticated by the governor of the state making the demand."

When, in a foreign state, a governor is called upon to perform the judicial duty of determining whether accused is a fugitive from justice, it ought to be fundamental that the copy of the "*charge* of crime" is not evidence of what it alleges.

We are aware, however, that it has been held in some cases that when the offense charged necessarily implies the actual presence of accused within the jurisdiction of the demanding state at the time of its alleged commission, he properly held on the rendition warrant. The cases of John Leary, 10 Benedict United States District Court Report, 197, and of *ex parte* Swearingen, 13 South Carolina, 74, are of this class.

It seems, however, that these cases proceed on the fallacy that the authenticated copy of the "charge of crime" proves something more than its mere existence and character.

This fallacy tends to confusion, as witness above case of *ex parte* Swearingen. The majority opinion in that case declared, as we have seen, that an affidavit certified as authentic by the demanding governor, which showed relator to be a "fugitive from justice," would be incompetent evidence on that question before the demanded governor. See page 79 of the opinion. The court then declared that the *copy* of the affidavit in the case containing the charge of crime duly authenticated by the demanding governor, was *prima facie* evidence that accused was

in the demanding state at date of alleged commission of crime charged.

The question naturally arises how a court could hold that a separate affidavit authenticated by the demanding governor, declaring relator to have been in the demanding state at date of the commission of crime charged, is incompetent evidence on the question whether accused is a fugitive from justice and *yet that a copy of an affidavit so authenticated charging the* crime itself, is competent evidence on that question.

This confusion arises from not limiting the authenticated charge of crime as a piece of evidence to the purpose intended by said Section 5278, Revised Statutes.

But above cases are not in point here, for in the case at bar it is self-evident that the crime of "uttering forged wills" does not necessarily imply the actual presence of accused in the demanding state.

Constructive presence there is perfectly consistent with the allegation of crime laid in the indictment.

A petition to prove a will can readily reach the probate court by the action of the accused without personal presence in the demanding state.

It cannot be claimed here by the demanding state that the indictment is evidence of the *actual presence* of accused in that state on November 20, 1901, because it has been its contention up to this point, and still is as we understand it, that there was competent evidence before the governor to show her flight sixteen days before that date.

We do not anticipate that, under the rules of evidence, the Supreme Court of the United States will ever hold that a copy of a charge of crime, made in a foreign state by an *ex parte* tribunal before whom accused had no power or right to be heard, can be received as evidence against him in a matter involving his personal liberty; nor, that under the rules of evidence, it will be claimed in this case that the unsworn, unauthenticated certificate of George A. Sanderson, addressed to the governor of Massachusetts, was competent evidence to be considered by Governor Jordan in the discharge of his judicial duty of determining whether this relator was a "fugitive from justice."

But the Supreme Court of New Hampshire held that "legal rules prescribing the competency of proof do not, in the absence of statute, govern the admission of evidence in extradition proceedings, except so far as the executive may see fit to adopt them."

In the case at bar no statute pointed out the character of the evidence to be received by Governor Jordan; he was, therefore, according to this decision, exempt from any obligation to observe any rule of evidence. In other words, in the discharge of his judicial duty in this respect, he was a law unto himself.

On the ground that he was legally guided by no rule of evidence the court held that he was justified in receiving in evidence a copy of the Whitney affidavit and treating it as worthy of credit, although in the language of the court, "The copy of an affidavit would not answer the requirements of legal proof in a court of justice; and the same is true of the original affidavit."

In discussing the question of the discharge by the governor of his judicial duty in this respect, the court say:

"As the governor should not have issued his warrant without proof that the accused was a fugitive from justice, it is argued that the record evidence was incompetent and insufficient to warrant such a finding. But the character of proof essential to establish the fact is not prescribed by the act of Congress * * * or the statute of this state; it appears to have been the policy of Congress and of the Legislature to permit the chief executive to determine the question upon such proof as seems to him worthy of credit."

We earnestly contend that it was not the policy nor the intention of Congress nor the Legislature to invest the governor with arbitrary power to decide what proof he should receive, that the statute must be construed in the light of constitutional provisions protecting from infringement the personal liberty of the citizen, hence, that while the governor may determine the question upon such "proof as seems to him worthy of credit," it must be upon such *competent* proof, such *legal* proof, as "seems to him worthy of credit."

The Supreme Court of New Hampshire has held in this case that relator can review in a court of justice the finding, made against her by the governor based on non-legal proof, and "If his finding of fact in this respect is erroneous the prisoner is unlawfully restrained of her liberty and is entitled to be discharged."

It is self-evident that on such review the prisoner is restricted to legal proof to rebut a finding based on *non*-legal proof.

In other words the finding that she is a fugitive from justice is based on a different class of evidence from that allowed her in rebuttal on her rendition hearing in court.

Is not this situation repugnant to one's natural sense of justice and to his legal sense of due process of law?

We have thus far been unable to find any case deciding the exact question here involved, but we have found more or less discussion as to the character of the proof essential to establish before the demanded governor the fact that accused is a fugitive from justice, and we find no warrant in the tendency of this discussion for the doctrine that the governor in deciding what proof he shall receive is a law unto himself and can receive legal or *non*-legal proof as he chooses.

In the case of *ex parte* Swearingen, 13 S. C., to which we have already referred, Chief Justice Willard in a strongly written dissenting opinion makes the following observations on the character of the evidence presented to the demanded governor in that case:

"The process under which it is sought to deprive the relator of his liberty is in derogation of the common law, and every fact necessary to warrant it is jurisdictional, and must be both alleged and proven. The competency of the proof must be determined by the laws of this state, where there is no conflicting rule established by competent authority displacing these laws.

"The only evidence on the part of the demandant state to which our attention has been called for the purpose of proving that the relator had fled from justice, is contained in the affidavit taken in Georgia before a magistrate of that state, which constitutes the charge made against the relator in the criminal court of Georgia, a copy of which only is before us, having been transmitted by the governor of Georgia. It is clear that a copy of an affidavit sworn in the state of Georgia before a person not competent to administer an oath, so as to make competent testimony to be used before the courts of this state, is, in itself, incompetent proof of any fact on which the liability of the citizen depends in the courts. Before testimony can subserve such a purpose, it must, except in a restricted class of cases, to which the present does not belong, be given under the sanction of an oath, carrying with it the penal consequences of false swearing.

"The proof in question can only be received where it is made such by competent authority.

"It will not be pretended that the act of Congress makes the copy of the indictment or affidavit transmitted by the demandant state proof of any fact beyond that, that the relator has been charged with crime in the state of Georgia. * * *

"In my judgment it was for the demandant state to affirm and establish the fact that the relator had fled from justice, and if it be true that the relator has not traversed that fact, that cir-

cumstance is immaterial, as he was not bound to traverse it until it was alleged in a competent manner.

"One cannot be prejudiced by his silence except when the law compels him to speak, and the relator had a perfect right to remain silent and cast upon the demandant state the onus of showing its right to interfere with his liberty. * * *

"In my judgment there is not competent proof to warrant the surrender of the relator to the public authorities of the state of Georgia."

In the case of *re* Jackson, 2 Flippin, 183, the Court, on page 186, uses the following language:

"Now it is manifest that before the executive of Michigan is authorized to issue his warrant to cause to be arrested and secured, a person charged in another state with crime, it should be shown by evidence making a *prima facie* case that such person has fled from the demanding state. This should be shown by *competent* evidence, as the fact of fleeing lies at the foundation of the right to issue a warrant of extradition. The certificate of the demanding governor is no evidence of the fact. Neither the act of Congress nor any rule of evidence makes his certificate evidence of such fact. The act of Congress makes it the duty of the executive of the state 'to which such person has fled' to cause him to be arrested and secured.

"The mere fact that a citizen of Michigan has been charged with crime and indicted in another state is not legally sufficient to authorize the arrest and extradition of such a citizen. He may be charged with crime, and indicted in a state into which he has never entered or was never in, and from which, therefore, he never fled.

"It is as essential to the right of arrest and extradition to prove to the satisfaction of the governor of Michigan that the person charged with crime has fled from justice, as to prove that he is charged with a crime in such other state.

"The latter is sufficiently proved in either of the two methods provided by the law of Congress; by copy of an indictment, or by an affidavit made before some magistrate, charging the person demanded with having committed a crime certified as authentic by the demanding governor.

"No provision is made as to the method of proving that the person demanded as a fugitive has fled from justice.

"But when the constitution says a person charged with crime, 'Who shall flee from justice' shall be delivered up, the converse is that a person charged with crime, who shall not have fled from justice, shall not be delivered up to be removed.

"Hence, it is essential that it be shown that the accused is a fugitive from justice. * * *

"The evidence that the person has fled from justice must not only be satisfactory to the governor, but must be *legally sufficient* before the executive authority can be exercised.

"He cannot act upon rumor nor upon the mere representation of a person, nor upon the demanding governor's certificate.

"It should be *sworn* evidence, such as will authorize a warrant of arrest in any other case."

In *People* v. *Hyatt*, 172 New York 176, the court, on page 189, says: "The act of Congress provides that a copy of the indictment or the affidavit before a magistrate shall be proof of the charge of crime against any person whose extradition is sought, but it does not prescribe what shall be evidence that he is a fugitive from justice. The fact that he is a fugitive is, therefore, a matter of proof."

In the matter of Reggel 114, U. S. 651, it was said by Justice Harlan: "The appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction so that he could not be reached by her criminal process. * * * Upon the executive of the state in which the accused is found rests the responsibility of determining, in some *legal mode*, whether he is a fugitive from the justice of the demanding state.

"He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him by *competent* proof, that the accused is, in fact, a fugitive from the justice of the demanding state."

It is true that Justice Matthews, in *Roberts* v. *Reilly*, 116 U. S., in referring to the duty of the governor in this particular, suggests that the latter must decide this question of fact "upon such evidence as he may deem satisfactory," but we do not understand him to mean that the governor can decide upon incompetent, illegal, unsworn evidence, nor upon an unverified copy of a piece of evidence used in an *ex parte* foreign proceeding.

If that is the case, the liberty of accused necessarily rests for all practical purposes upon the arbitrary will of the demanded governor.

It may be that it is proper to submit to the demanded governor evidence of the flight of accused in the form of an affidavit or affidavits whenever the latter does not appear and ask for a hearing, but if so, the same should be taken in the demanded state before one competent to administer an oath in such state.

It may be urged that it would ordinarily be a matter of inconvenience to the demanding state to be obliged to submit affidavits taken in the demanded state, as in some instances it might compel the witnesses to go from one state to the other to make the affidavit or affidavits in question.

Does that involve greater inconvenience to the prosecution than its opposite imposes on relator, viz.: his arrest and exile from the demanded state on evidence which, if ever so false, and so proved, does not subject affiants to any punishment in the state in which the evidence is offered?

No citizen should be arrested and exiled from a state on evidence which does not carry with it in such state the penal consequence of false swearing.

In the case of *ex parte* Hart, 63 Federal Reporter, the court did not consider the question of convenience in deciding that relator could not be held in an extradition proceeding based not on "indictment" but on "information."

Neither *ex parte* Reggel, 114 U. S. 642, nor *Roberts* v. *Reilly*, 116, 80, is an authority to the point that a foreign affidavit is competent evidence before the demanded governor, because in neither case was that precise question raised, viz.: the competency of a foreign affidavit, nor was it considered in the published opinions.

If, however, the contrary is true, the doctrine would not apply to the case at bar, because here we have no foreign affidavit made for use in this proceeding, but only what purports to be evidence in the form of a copy that an affidavit was made for some purpose in the demanding state, but whether used for any purpose does not appear except by inference, neither does it appear that the copy is a true copy of the original, nor that Wardwell, before whom the original purported to be executed, was a justice of the peace and so authorized to administer oaths.

To sum up the matter, the objections to the competency of the evidence, laid before Governor Jordan, are as follows:

First. There is no state or national statute providing for the authentication of a *copy* of a foreign affidavit and making it evidence in a case like this.

Second. If there were, it would not avail here because no authentication of any kind existed as to the copy offered and accepted in evidence.

Third. Because as the original was executed in a foreign state affiant was not liable to the law of the state in which the copy was offered.

Fourth. Because the acceptance of the *copy* as evidence

could not possibly subject affiant in *any state* to the penal consequences of false swearing; the use of *copies* of a foreign affidavit in a judicial proceeding or *quasi* judicial proceeding is not evidence under oath within the meaning of the law pertaining to the crime of perjury.

Fifth. The copy was secondary evidence and no reason was assigned why its original was not produced.

Sixth. The certificate of George A. Sanderson was not under oath and his signature to the certificate was not vertified.

Seventh. The indictment containing the charge of crime could not be received as evidence of its own allegations. In other words, it could not prove itself, and if it could, the commission of the crime did not necessarily imply the presence of relator at the time and place of the alleged offense, since "uttering a forged will" is a crime which does not require personal presence in a state in order to its commission.

II.

It Was Error in Law to Hold that the Refusal of the Governor to Hear Your Relator at the Time and Under the Circumstances in Which She Appeared Before Him, Was "Due Process of Law" and Deprived Her of no Legal Right.

In treating of the writ of *habeas corpus* in interstate extradition, Spear, in the first edition of his work on extradition, page 340, expresses himself as follows:

"The delivering executive, who issues his warrant for the arrest and delivery of any accused party, should always direct that before his actual delivery to the agent of another state or territory he should have a reasonable opportunity to apply for a writ of *habeas corpus*, to the end that he may assert his legal rights before a court of justice, and be discharged from custody if the proceedings against him shall be proved illegal.

"This is required by the law of Massachusetts, and whether required or not by statute law, every executive should see to it that the party arrested under his order is not cheated out of his privilege by the summary manner of his removal.

"That privilege is a right guaranteed to him by the common law of the country."

Anderson's *Dictionary of Law*, under the head of "Habeas Corpus," has the following:

"It is a new suit brought by him to enforce a right, which he

claims, as against those who are holding him in custody under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds, he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. It is of a wholly civil nature."

In the exercise of this right relator petitioned for this writ, alleging that she was illegally restrained of her liberty.

To determine this question the Court, before whom the *habeas corpus* proceedings were instituted, sat as a court of review, and upon the evidence should have discharged this relator on the motion made for that purpose, because it appeared that no *legal finding* was made that relator was a fugitive from justice. Such *legal* finding was a *condition precedent* to the issue of the warrant.

A finding, made in the teeth of a refusal to grant your relator a hearing on the question whether she was a fugitive from justice, could not in the nature of things be a legal finding nor justify the issue of the rendition warrant.

When relator, claiming he is not a fugitive from justice and asking to be heard and to offer evidence in his own behalf, appears before the governor, the hearing must be granted in order that the governor may properly perform his "judicial duty."

If such appearance did not entitled him to a hearing he would not be entitled to one subsequently on *habeas corpus* proceeding, as the sole object of the latter proceeding is to *vindicate* a right of which relator has been *deprived*, not to enforce one of which he has *not* been deprived.

The proper performance of a judicial duty involves in its very nature the granting of a hearing to all interested who appear and ask to be heard.

In the case at bar the governor was about to enter upon the discharge of a judicial duty which might result in a finding which would deprive this relator of her liberty, yet he declined to hear her, refused to consider any evidence except that contained in the requisiton papers furnished by the demanding state, made his finding against her and on that finding so made based his rendition warrant.

How is it possible to consider such a finding a judicial finding, or to support a warrant based thereon?

The rendition warrant cannot stand differently than if the law had made it the duty of the secretary of state to issue it after the governor had filed with him his finding in the case.

In speaking of the warrant the Supreme Court of New Hampshire says:

"It was also expressly provided in the rendition warrant that she should be afforded an opportunity to sue out a writ of *habeas corpus* before being delivered over to the Massachusetts authorities."

But the warrant cannot find support from the fact that it contained a command to afford relator such opportunity to sue out a writ of *habeas corpus* as the laws of the state prescribed.

She had a common law and statutory right to sue out this writ and the said warrant simply recognized it.

The petition of relator could not affect the warrant. It was simply a step in the direction of her discharge in case the warrant was not based on a legal finding.

As shown in printed record, page 27, relator was arrested on the warrant March fourth, petitioned for a writ of *habeas corpus* on the fifth, which was granted on the eighth, and hearing occurred on the fifteenth.

The question is, Was she illegally arrested on the fourth and illegally restrained of her liberty thereafter?

In other words, was the arrest of this relator on a process issued after a refusal to hear her, on a question which involved the discharge of a judicial duty on the one hand and the liberty of this relator on the other, "due process of law" as that term is used in Articles 5 and 14 of the amendments to the Constitution of the United States?

It is urged by the Supreme Court of New Hampshire that the refusal of the governor to hear this relator infringed no legal right possessed by her, and in support of this proposition Justice Bingham uses the following language:

"If the relator had the right not to be removed from the state without a judicial trial, the issuing of the warrant for her arrest did not conclude her right in this respect. Under the law of this state she could sue out a writ of *habeas corpus* and test the question whether she was a fugitive from justice; and if it were made to appear to the court that the finding of the governor on this question was erroneous, she would be entitled to her discharge. *State* v. *Clough*, 71 N. H. 594, 600, 601."

The fallacy of above consists in the assumption that making it "appear to the court that the finding of the governor on this question was erroneous 'constitutes' a 'judicial trial.'"

Proving in a court of justice that an *ex parte* finding made by the governor that one is a "fugitive from justice" is an erroneous finding of fact is a *review* of the finding so made in room of

a "judicial trial." The privilege of proving that an *ex parte* judgment rendered against one is a wrong judgment, is not such a "judicial trial" as the common law contemplates.

Was it "due process of law" to compel relator to submit to an *ex parte* finding against her, to arrest, and to the expense of employing counsel to sue out a writ of *habeas corpus*, and to detention in custody from March fourth, A. D. 1902, to March fifteenth in order to be heard?

Was it "due process of law" to compel relator to submit to a finding based on a rejection of the evidence offered by her and a consideration of only such evidence as was offered against her? A finding which she must subsequently, after arrest, delay and expense, meet in a court of law as a judgment against her, or be exiled from the state.

Again, if relator had a legal right in a court of law to review a finding made against her, why had she not a right to be heard where the original finding was made?

Which is the more essential to relator, a mere right to review a finding, or to be heard when the finding is made?

Let us see what the Supreme Court of New Hampshire says as to the right of relator to be heard at such "finding":

"The relator contends that the warrant upon which she was arrested was illegally issued, because she was not permitted to be heard before the governor upon the question whether she was a fugitive from justice, and assigns this as a reason why she should be discharged from arrest.

"It was a question of fact to be determined in the first instance by the governor, whether the relator was a fugitive from justice (in *re* Cook, 49 Fed. R. 833, 838); but she was then not entitled as of right to be heard. It was discretionary with the governor to grant or deny her request.

* * * * * * *

"While the presence of the relator at the hearing obviated the usual objection to giving the accused notice, yet her presence did not create a legal right to be heard, and no such right previously existed."

One can search above language in vain for an answer to the question as to why accused had not a right to be heard when Governor Jordan performed his judicial duty of determining in the first instance whether she was a fugitive from justice. The Court contents itself with stating the proposition that she had no right to be heard and gives no reason therefor.

The Court does suggest in the opinion, as witness prior quotation, that if relator had a legal right to be heard she obtained

that right in the suit begun by her to obtain her liberty; but that is no answer to her claim that she had a right to be heard at the finding which deprived her of her liberty. The fact that in her suit she had a right to disprove said finding by rebutting evidence offers no reason why she should not have been heard before the governor when he made this finding, nor why she should suffer the indignity of imprisonment and the delay and expense of a suit in order to introduce her rebutting evidence.

As has already been seen, the warrant of arrest provided in substance that she should be given an opportunity to bring her suit before delivery to Massachusetts authorities. She availed herself of this privilege, but instead of introducing evidence rebutting that on which the governor based his finding, she contented herself with showing the character of the evidence admitted by him, also that he refused to hear her and then asked to be discharged on the ground that the finding on which he based his warrant was not a legal finding.

It is obvious that if relator had proceeded to introduce rebutting evidence she would have waived her objections to the finding of the governor, objections based on his refusal to hear her, and on the incompetent evidence received by him; hence when the court *ordered* her to introduce such rebutting evidence she could only point out that such action would constitute a waiver of her objections to the finding of the governor, on which she relied for her discharge; and when the court then *directed* that she state whether she waived her right to then, or at any future time, put in such evidence, she found the court intended her to make an election as to which course she should pursue, which she did.

In speaking of her action in this particular, Justice Bingham says:

"In the trial before the Superior Court she declined, and expressly waived, the right to then, or at any future time, offer evidence showing that she was not a fugitive from justice, and contented herself with submitting the record evidence presented to the governor and causing it to appear that she had been denied a hearing before him.

"As the relator was entitled, in the trial before the Superior Court, to review the action of the governor, and be discharged, if his finding upon this question of fact was erroneous, or if there was no evidence from which he was warranted in making the finding, we are unable to see wherein she has been deprived of any right to be heard to which she was legally entitled."

If this relator had no legal right to be heard before the gov-

ernor, it is evident that she has not been deprived of any right to be heard to which she was legally entitled, but we demur to the doctrine that she had no right to be heard before the governor.

The refusal of the governor to hear her deprived her of a judicial trial, and resulted in her imprisonment.

The fact that she had a right to bring this suit did not alter his action in the premises nor, *if* such action was legal, save her from the necessity of proving in a court of law that she was *not* a "fugitive from justice."

It is an essential part of every "judicial trial" that the person charged shall not be required to prove his innocence.

The action of the governor deprived this relator of an important right, viz.: that of compelling the demanding state to maintain the affirmative of the issue that she was a "fugitive from justice."

While the Supreme Court of New Hampshire assigns no direct reason for the doctrine that relator had no legal right to be heard before the governor, it does so by inference, in the following language:

"It is not the practice in such proceedings to give the accused notice before the rendition warrant is issued, and the act of Congress and the statutes of this state do not contain a provision requiring that she should be notified.

"The reason for the omission of such a provision is apparant, —if notice were required, the practical operation of the law would be nugatory and its purpose defeated. It is an *ex parte* proceeding, and necessarily so. *In re* Cook, *supra*, 838."

The necessary inference from the foregoing is that as relator had no right to notice, she had no right to be heard.

We contend that the right to be heard does not turn on the right to notice, but the right to notice on the right to be heard.

The lack of the right to be heard carries with it the lack of right to notice, but the lack of the right to notice does not necessarily carry with it the lack of right to be heard.

If the right to be heard in this case was extinguished by the lack of right to notice, how could this relator obtain a hearing by means of her suit?

In other words, how could she obtain, by means of a new suit, what she was not entitled to have in the first instance?

Because a man is not entitled to notice, it does not necessarily follow that his right to be heard is extinguished.

If a substantial reason exists for not giving notice, the right to be heard may still continue, so that if, as in the case at bar,

relator appears without notice, and insists on his right to be heard, it must be granted.

If relator has a right to a writ of *habeas corpus*, in order to enable him to exercise his constitutional right to be heard, of which exercise he has been deprived through *lack of notice*, it necessarily follows that when he appears *without notice* before the governor, at the proper time, to then deny his request to be heard is as much a denial of his constitutional right as to deny him the writ of *habeas corpus*.

It must not be forgotten that in an extradition proceeding the hearing before the governor, which precedes the warrant, is for the purpose of establishing the truth of the charge that relator is a "fugitive from justice," and the warrant is *final* process to carry such finding into effect; therefore if relator had no legal or constitutional right to be heard on that question before the governor, it is very difficult to understand how he could bring and maintain a suit to be heard later in court on that question.

But if he had such right before the governor, and for any good reason, by lack of right to notice or in any other manner was deprived of the opportunity to exercise it, then it is clear how and why he could bring a *habeas corpus* suit and exercise that right, under such limitations as the nature of the legal situation imposed upon him.

Sections 1, 2, and 3, Chapter 263, Pub. Statutes of this state provide for securing the person of relator in anticipation of action by the demanding state under the provisions of Chapter 5278, Revised Statutes of the United States. In view of this law we quote from page 24 of the printed record of this case, as follows:

"At the adjourned hearing the relator, subject to the defendant's exception, introduced evidence from which it appeared that the relator was arrested March 3, 1902, by the sheriff of Merrimack county, upon a complaint and warrant, under Sections 1 and 2, Chapter 263, of the Public Statutes, charging her with uttering forged wills and being a fugitive from justice.

"The requisition papers were filed with the secretary of state March 3, and on March 4 were laid before the governor, when counsel for the relator appeared before the governor and stated that they desired a hearing before him."

It appears from above that this relator, under the extradition law of New Hampshire, was given notice of this proceeding, and her person secured in anticipation of a continuation of the extradition proceeding before the governor and, because of this notice and arrest under the statutes, was there represented by

counsel, hence accused was actually notified under the statutes, was present at the hearing and was within her rights in asking to be heard, and the warrant which issued in defiance of such right was illegally issued and your relator is entitled to her discharge.

Hovey *v.* Elliott, 167 U. S. 409.
Roller *v.* Holly, 176 U. S. 398, 409.

UNDER THE ORGANIC AND STATUTORY LAW OF THE UNITED STATES YOUR RELATOR WAS ILLEGALLY RESTRAINED OF HER LIBERTY AND THE RENDERING OF JUDGMENT AGAINST HER VIOLATED HER CONSTITUTIONAL RIGHTS.

Under the decision of the Supreme Court of New Hampshire, when this relator appeared before Governor Jordan at the moment he was about to determine the question whether she was a "fugitive from justice," and asked to be heard, she had no legal right to have her request granted, and in refusing it, considering only the evidence offered against her, making his finding and issuing his warrant for her arrest, he violated none of her rights.

The above decision and the judgment of the Superior Court of New Hampshire based thereon, was the culmination of a continued violation of the legal right of your relator to personal liberty. The character of such violation of her personal liberty as this relator has suffered is forbidden, not only by such express constitutional provisions as appear in Sections 5 and 14 of the amendments to the Constitution of the United States, and Article 15 of the bill of rights for the State of New Hampshire, but by the fundamental principles of justice and of human liberty which inhere in an unwritten as well as a written constitution.

Even this decision recognizes relator's right to a writ of *habeas corpus* as a means and mode of asserting her right to a hearing in the court on the question of whether she was a fugitive from justice, and so is inconsistent with itself, because relator could have no right to be heard in court if she had none before the governor; her right to be heard there must be the foundation of her right to be heard in court; having lost her opportunity there through the illegal action of the governor she could rely upon it in court as a ground for discharge, or she could waive the usury and rebut his finding by rebutting evidence. She elected the former and the reasons assigned for the refusal to discharge is that the action of the governor was not illegal because relator was not entitled to notice to appear before him; as if her right

to a hearing necessarily depended on her right to notice, even when she was actually present and had been given actual notice in the most unpleasant manner possible.

It is true that ordinarily right to notice and to a hearing go hand in hand, but the former is an incident of the latter and if for any reason the two are divorced the principal may exist though the incident be extinguished.

In the absence of action to secure the person of relator under Section 1, Chapter 263, Public Statutes, Governor Jordan would not have been required to give her notice of the proposed rendition hearing before him, for fear she might make a wrong use of it by leaving the state, but his finding against her at such hearing would still have been a judgment in effect, and under the circumstances would have supported the rendition warrant. Nevertheless, as she still had a right to be heard, notwithstanding lack of notice, she could have begun her suit by writ of *habeas corpus*, and obtained it in court. The fact that such hearing would be a mere *review* of the judgment or finding of the governor, would be one of the limitations of the legal situation for which no one would be in fault. She would still have all her legal rights secured to her, of which the nature of the legal situation permitted, but as in this case action was taken under said section of the statute, and the person of this relator secured and she appeared in season and asked the governor to hear her. The entire legal situation was altered and her request should have been granted, and its denial rendered the governor's finding illegal and the warrant based thereon invalid.

The constitutional principles applicable to the preservation of personal liberty should be at least as strenuously applied when there is occasion therefor, as in the case of right to property; that it may be seen that the New Hampshire court has not been remiss in the latter particular and because the discussions of the court throw light on the principle involved herein.

We cite the following cases:

East Kingston v. *Darius Towle*, 48 N. H. 57, 60, 61, 62.
Opinion of the Justices, 66 N. H. 629, 632, 633.
Carter v. *Colby*, 71 N. H. 230, 231.
State v. *Jackman*, 69 N. H. 318, 330.

EDWARD A. LANE.

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BRIEF FOR DEFENDANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 126.

MARTHA S. MUNSEY, PLAINTIFF IN ERROR,

vs.

M. SWAIN CLOUGH, SHERIFF OF MERRIMACK COUNTY

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

OCTOBER TERM, 1904.

(19,091.)

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M. SWAIN CLOUGH, SHERIFF OF MERRIMACK COUNTY.

BRIEF FOR THE DEFENDANT.

The plaintiff in error was indicted in Massachusetts for uttering three forged wills. The indictment contained three counts, each alleging the uttering of a different will. The plaintiff in error fled to New Hampshire before she was arrested. A requisition was issued by the Governor of Massachusetts demanding of the Governor of New Hampshire the return of the plaintiff in error as a fugitive from justice. This requisition was honored and a warrant for the return of the plaintiff in error was granted. The plaintiff in error sued out a writ of habeas corpus, and the questions raised by her have been passed upon by the Supreme Court of New Hampshire in State *v.* Clough, 71 N. H. 594, and in State *v.* Clough, 72 N. H. 178.

The questions raised by the plaintiff in error appear in the Assignment of Errors upon pages 37 and 38 of the Transcript of Record. They will be considered in the order in which they are there stated.

First Assignment in Error.

The plaintiff in error claims that the evidence submitted to the Governor of New Hampshire did not justify the issuance of the rendition warrant because it failed to show that she was a fugitive from justice as to all the crimes with which she was charged, and for which she was demanded in the extradition proceedings. She further claims that it appears from the record evidence that she left the state prior to the date of the alleged commission of one of said crimes for which she was demanded for trial, and that the issuance of the rendition warrant upon this evidence deprives her of her liberty without "due process of law" in violation of the 5th Amendment to the Constitution of the United States and denies to her while in its jurisdiction equal protection of the law in violation of the 14th Amendment of the said Constitution, and further that the issuance of a rendition warrant upon this evidence was in violation of Section 2 of Art. 4 of said Constitution which provides that a person charged in any state with treason, felony or other crime who shall flee from justice and be found in another state shall, on the demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

The crimes charged against the plaintiff in error are alleged to have been committed respectively, on the 28th day of February, 1895, the 17th day of May, 1895, and the 20th day of November, 1901 (pp. 7–8–9 of Record).

The plaintiff bases this assignment of error upon an expression in the affidavit of one Jophanus H. Whitney, which accompanied the requisition papers and may be found on p. 10 of the Record. This affidavit states that the plaintiff in error fled from the Commonwealth of Massachusetts on or about the 4th day of November, 1901.

I.

At common law the time of the commission of an offence need not be proved as alleged,

Ledbetter *v.* U. S., 170 U. S. 606.
Commonwealth *v.* Sego, 125 Mass. 210, 214.
Commonwealth *v.* Brown, 167 Mass. 144.

This rule of law as to time should have the same application in requisition proceedings that it has in the trial of the case.

Even with an apparent inconsistency between the date alleged in the third count of the indictment and this affidavit the court in the state to which the party charged with the crime has fled is not to assume that the state asking for a return of the fugitive is to be bound at the trial by the date alleged in the indictment. It would be more reasonable to assume that at the trial the offence charged in the third count would appear to have been committed previous to the date of flight as stated in the affidavit.

An indictment which alleges no date for the commission of an offence is good in Massachusetts (Revised Laws of Massachusetts, Chapter 218, Section 20).

II.

The evidence submitted to the Governor of New Hampshire, taken as a whole, should be construed to mean that the defendant fled from Massachusetts after the commission of the last offence charged in the indictment.

The affidavit above referred to states :

(*a*) That Munsey stands charged by indictment with the crime of uttering forged wills as is more fully set forth in the papers annexed.

(*b*) That said Munsey has fled from the limits of the Commonwealth and is a fugitive from justice.

(*c*) That at the time of the commission of said crime she was in the state of Massachusetts, and

(*d*) That at the same time and previous thereto she was a resident of Cambridge.

A fair construction of the statement thus far is that at the time of the commission of each of the offences named in the indictment the defendant was in Massachusetts and was a resident of Cambridge and thereafter fled from the limits of the Commonwealth.

It would be fair for both the Governor of New Hampshire and the court, passing upon the question raised, to find that the whole affidavit meant that the flight occurred after the commission of all the crimes.

It is further to be noticed that the date of flight stated in the affidavit does not purport to be an exact statement of the date. The expression is: that she fled "on or about the 4th day of November."

In addition to this affidavit the Governor of New Hampshire had before him the statement of the Governor of Massachusetts to the effect that the plaintiff in error had fled from justice in that Commonwealth and the statement of the District Attorney to the effect that the plaintiff in error fled from the jurisdiction of Massachusetts to avoid prosecution and is now a fugitive from justice, and that he believes that there is sufficient evidence to convict. It also appears at the end of the first and second counts of the indictment that the Grand Jury found that at no time since the commission of the offences therein set forth had the defendant been usually and publicly a resident of said Commonwealth of Massachusetts.

III.

The attention of the Court is also called to the fact that the plaintiff in error waived the right to submit evidence in the habeas corpus proceedings as to whether she was in fact a fugitive from justice. This issue was then open to her as to all the counts in the indictment.

IV.

It is sufficient to justify the extradition of the plaintiff in error if it appears that she is a fugitive from the state asking her return as to one crime committed in the state.

If the state asking for the return of a party indicted is bound for the purpose of requisition by the dates alleged in the indictment, and if the affidavit in question in connection with other facts that appear of record is to be construed to mean that the defendant fled from Massachusetts before the commission of the offences alleged in the last count of the indictment, even then it appears that she fled from Massachusetts after the commission of the offences set out in the first and second counts of the indictment.

The statement of the law on this point appears in the opinion of the Superior Court of New Hampshire (p. 17 of the Record.)

"But the fact, if it be one, that the relator departed from the demanding state before the commission of one crime alleged in the indictment, for which alone she could not be extradited, suggests no reason why she could not legally be returned for other crimes alleged to have been committed there before she left. The possibility that she may be tried on the last count alone does not exclude her from the class of persons made liable to extradition by the Federal Constitution. She is still "a person * * * charged with * * * crime." The question is, not whether the governor might decline to extradite her for that reason, or because he believed the demand was not made in good faith, but whether her rights of citizenship are infringed by her rendition to answer to such an indictment. Neither the constitution nor the statutes upon the subject make an exception of that character.

Lascelles *v.* Georgia, 148 U. S. 537, 542, 547.
Commonwealth *v.* Wright, 158 Mass. 149.

If the indictment upon which this proceeding is based had contained only the first count, but it appeared that another indict-

ment containing the other counts was pending in the same court, that fact would not prevent the rendition of the prisoner, though the question in legal effect would be substantially the same as is presented here. The governor was justified in finding that she was a fugitive with reference to the first two counts in the indictment. But upon that question the relator is entitled to submit evidence and be heard; and the justice before whom the habeas corpus proceedings were returned may review the action of the governor in this respect. The governor's finding that the relator is a fugitive is not conclusive upon the court on habeas corpus.

Church Habeas Corpus, S. 474 a.
2 Moore Ext., s. 640.
Spear, Extrad. 391.
Hartman *v.* Aveline, 63 Ind. 344.
Jones *v.* Leonard, 50 Ia. 106.
In re Mohr, 73 Ala. 503.

V.

"An indictment is sufficient for the purpose of extradition proceedings when it is framed in accordance with the technical rules of pleading of the state within which it is found, and where the offence was committed."

Encyclopedia of Pleading and Practice, p. 816.

Should this court consider that the plaintiff has in this first assignment of error raised a question as to the sufficiency of an indictment which contains more than one count, it will be found, we submit, that this indictment conforms to the requirements of the law of Massachusetts.

In support of this proposition we would direct the court's attention to the following cases:

In Commonwealth *v.* Hills, 10 Cush. 530, the indictment contained four counts, the first and second described the same offence,

but the third and fourth each described an offence different from that charged in the first and second counts.

The jury found the defendant guilty on the second and fourth counts, and not guilty on the first and third.

The Court, in considering the questions of law raised by the joinder of distinct offences in one indictment, says:

"In the view we take of this matter, it is unnecessary to consider particularly the question whether these charges are felonies, inasmuch as we are satisfied that the long-established practice in this commonwealth has been to present distinct larcenies in the same indictment, and also distinct offences of receiving stolen goods in the same indictment, in different counts. It has been considered to be no objection to this practice that the charges were felonies, provided that they were offences of the same general nature requiring the same mode of trial, and having the punishment annexed to them of a like nature. In the case of Carlton *v.* Commonwealth, 5 Met. 532, this practice was fully recognized and sanctioned. It is always open to the presiding judge to order a separate trial in each distinct charge, when there is any reason for supposing that the defendant will be perplexed in his defence or unnecessarily embarrassed by being put on trial for two distinct offences. We see no good reason for holding that it is illegal to present in the same indictment felonious offences of a similar character, and having a like punishment. In misdemeanors, it is admitted that this may be done, and the distinction set up as to felonies as a class is by no means a satisfactory distinction, or based on any sound principle; as many petty offences, as, for example, larcenies of the most trifling amount, have always heretofore, and until the very recent statute of 1852, c. 4, been denominated felonies.

"Under the limitation as to the nature and character of the offences joined, as was very fully and properly stated by the presiding judge, the court are of opinion that distinct felonies may be charged in the same indictment, and that the ordering of separate

trials in such case is a matter to be decided by the presiding judge. The result is that all the exceptions taken are overruled."

We would also call attention to Commonwealth *v.* Costello, 120 Mass. 358.

This was an indictment for forgery in four counts; the first count being for forging a certain bond, the second, for uttering that bond, the third, for forging an entirely different bond on another occasion, and the fourth for uttering the second bond.

The defendant moved to quash the indictment on the ground that there being two distinct and felonious acts, not parts of the same transaction, such counts were improperly joined, but the court held:

"It has long been common in practice in this Commonwealth to include in one indictment charges of distinct substantive acts, even when such acts are felonious in their character, if they are of the same general description and the mode of trial and the nature of the punishment are the same. The correctness of this has been recognized fully by several decisions of this court, and it has been held that it is competent for the court, if it sees any danger that the defendant will be embarrassed by the multiplicity of the charges against him, to direct the government to proceed upon one count or sets of counts only, so that no rights of the defendant are imperiled thereby. Carlton *v.* Commonwealth, 5 Met. 532; Booth *v.* Commonwealth, 5 Met. 535; Joslyn *v.* Commonwealth, 6 Met. 236; Commonwealth *v.* Cain, 102 Mass. 487; Commonwealth *v.* Sullivan, 104 Mass. 552. Nor has the matter of joinder of offences distinct and separate in their character been in any way changed by the statute of 1861, c. 181, but continues to stand exactly as it did previous to this enactment."

See also Carlton *v.* Commonwealth, 5 Met. 532; Commonwealth *v.* Jacobs, 152 Mass. 276; Benson *v.* Commonwealth, 158 Mass. 164.

Conclusion.

If the record evidence that accompained the indictment fairly interpreted means that the defendant fled from the state where the crime was committed after the commission of all the crimes, there is no error under the First Assignment of Errors.

If the affidavit of Whitney is to be construed as claimed by the plaintiff in error, even then none of her rights have been violated because it appears that she committed at least two of the alleged offences previous to the date when the affidavit states that she fled from the jurisdiction of Massachusetts.

If, after the return of Munsey to the demanding state, she ought not to be put to her trial upon the third count of the indictment her rights will be fully protected by the court in which the trial is to be held.

Second Assignment of Error.

That the evidence contained in the requisition papers did not legally authorize a finding by the Governor that the plaintiff in error was a fugitive from justice as to any one of the crimes for which she was demanded.

This assignment has been considered in part in connection with the first assignment.

It is possible that the plaintiff in error may claim that the first two offences were barred by the statute of limitations before the dates stated in the Whitney affidavit as the approximate date upon which she fled, but the allegation in the indictment that the defendant has not been usually and publicly a resident of said Commonwealth since the commission of the offences takes the case out of the Statute of Limitations (Revised Laws of Massachusetts, Chap. 218, Sec. 52).

Third Assignment of Error.

That the documentary evidence submitted to the Governor was not competent to be considered by him on the question of fact whether the party indicted was a fugitive from justice, and especially that the Whitney affidavit was not competent evidence to be so considered.

(*a*) The law does not describe the character of evidence which the chief magistrate should have before granting a warrant to arrest

upon requisition, nor the precise rules by which facts shall be established before him.

Rev. Stat., Sec. 5278.
State *v.* Clough, 71 N. H. 594.

(*b*) "The issuance of the warrant embraces the exercise of the prerogative of the Governor of the state where the fugitive is and it must be presumed, in the absence of proof to the contrary, where the Executive acts in such case that he has performed his duty in that respect. Hence, when a proper warrant has been issued the burden of showing that the prisoner has not fled or is not a fugitive from justice rests upon the prisoner in habeas corpus proceedings."

State *v.* Justus, 24 Minn. 237.

(*c*) A party is a fugitive, if, having within a state committed that which by its laws constitutes a crime, he has left its jurisdiction and is found within the territory of another, when he is sought to be subjected to the criminal processes of the state where the crime is committed.

Roberts *v.* Reilly, 116 U. S. 80.

The fact that a man is charged with a crime in one state and is afterwards found in another has generally been regarded as prima facie evidence that he is a fugitive.

In the matter of Voorhees, 32 N. J. (Law) 141.

(*d*) Whether the relator is charged with a crime in another state, and whether she is a fugitive from justice, are questions upon which it was the duty of the governor to pass before ordering her removal from the state.

"Under the act of Congress, it became the duty of the governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared:

(1) That the demand by the executive authority of Pennsyl-

vania was accompanied by a copy of an indictment, or affidavit, made before a magistrate charging Reggel with having committed treason, felony or other crime within that state, and certified as authentic by her governor; (2), that the person demanded was a fugitive from justice."

Ex parte Reggel, 114 U. S. 642, 649.

"To be a fugitive from justice, in the sense of the Act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun; but simply that having, within a state, committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence he has left its jurisdiction, and is found within the territory of another."

Roberts *v.* Reilly, 116 U. S. 80, 97.

(*e*) The Governor in determining the question as to whether the defendant is a fugitive from justice may receive evidence that fails to meet the requirements of legal proof if he deems it advisable.

It appears to have been the policy of Congress and the Legislature to permit the chief magistrate to determine the question upon such proof as seems to him worthy of credit.

State *v.* Clough, 71 N. H. 594.
Roberts *v.* Reilly, 116 U. S. 80.
In re Cook, 49 Fed. Rep. 833.

It is submitted that upon the indictment, the statement of the District Attorney, and the request of the Governor of Massachusetts, the Governor of New Hampshire would have been justified in finding that the defendant Munsey was a fugitive from justice and in ordering her return.

(*f*) The affidavit of Whitney is not required by the Constitution of the United States nor by any act of Congress. It is un-

doubtedly attached to the requisition papers to conform to Revised Laws of Massachusetts, Chap. 217, Sec. 11, which provides that sworn proof that the accused is a fugitive from justice shall accompany an application for a requisition to the Governor. It was primarily intended to assist the Governor of Massachusetts in deciding the question whether he should ask for the return of the party indicted. No reason can be suggested why the Governor of New Hampshire should not also consider this evidence. It was sworn to before a Justice of the Peace.

(*g*) It also appears under the seal of the Commonwealth of Massachusetts that the documents annexed to this request for a rendition of the plaintiff in error are authentic and duly authenticated. Upon this presentation of facts to the Governor of New Hampshire he was justified in issuing his warrant for the return of Munsey.

(*h*) When the Governor of New Hampshire was satisfied, from any evidence which he chose to receive, that the defendant Munsey was a fugitive from justice, he had no discretion in the matter. His duty to sign the warrant was peremptory and prescribed by statute.

His duty, we contend, is made plain, by the language of Rev. Stats. U. S., sec. 5278, which is:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, *certified as authentic by the governor or chief magistrate of the state or territory from whence the person charged has fled*, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

The duty of the governor is further plainly indicated by Sec. 8, c. 263, of the Public Statutes of New Hampshire, in which it is provided: "*If the governor is satisfied that the demand is conformable to law and ought to be complied with, he shall issue his warrant under the seal of the state,* authorizing the agent who shall make the demand, either forthwith or at such time as shall be designated in the warrant, to take and transport such person to the line of the state, at the expense of such agent, and shall also, by the warrant, require the civil officers within this state to afford all needful assistance in the execution thereof."

Thus it became not the mere privilege, but the duty of the Governor of New Hampshire to act in the premises. It was discretionary with him, we submit, to grant an extended hearing on sundry questions of fact, if he deemed it essential or desirable, but it cannot be reasonably urged that he was bound so to do.

There is neither authority nor precedent to justify such a contention. His duty is made clear by the provisions of the Revised Statutes of the United States and the Statutes of New Hampshire cited above.

Ex parte Reggel, 114 U. S. 642, 649.

Therefore, in this case, we submit, every essential was complied with, and the governor in issuing his warrant was doing what he became bound, under the constitution and laws of the United States, to do on being satisfied that the necessary and proper steps had been taken in the case before him.

Fourth Assignment of Error.

That the refusal of the Governor of New Hampshire to hear the defendant Munsey before a warrant for her arrest was issued by him was not "due process of law" and deprived the defendant Munsey of her legal rights under the provisions of the 5th and 14th amendments to the Constitution of the United States.

If the proposition stated under the third assignment is correct, the Governor had a right to decide to issue the requisition upon any evidence that seemed to him sufficient and was under no obligation to hear the defendant. Her constitutional right to a judicial trial was given her in the proceedings on the writ of habeas corpus. She then had an opportunity to submit evidence on the question of fact as to whether she was a fugitive from justice and she declined to offer any evidence on that question. If the court had found that there was error in the finding of the Governor on this question the defendant Munsey would have been entitled to her discharge.

State *v.* Clough, 71 N. H. 594.

The habeas corpus proceedings were "due process of law" within the meaning of the Constitution, and gave the plaintiff in error an opportunity to review the action of the Governor in issuing the warrant for her arrest and the Governor's finding that she was a fugitive was not conclusive upon the court on habeas corpus.

Church on Habeas Corpus, Sec. 474 a.
Harmon *v.* Aveline, 63 Ind. 344.

The defendant Munsey has, therefore, been fully protected in all of her constitutional and legal rights.

Eleven days after her arrest she was given the fullest opportunity to present to the superior court the evidence in her behalf, if any, which she says the Governor of New Hampshire declined to hear and to try the question whether she was in fact a fugitive from justice.

She did not choose to do this, nor did she choose to present any evidence on any question, at the final hearing thirteen days later, contenting herself with further technical objections to the method of procedure of the governor, and even more technical and refined objections with reference to certain portions of the documentary proof submitted in support of the request for extradition of the Massachusetts executive.

We would suggest that not only has she been denied no rights, but that if the delay which has ensued in this case should become possible in all matters of this kind, the purposes sought to be gained by extradition laws would be defeated and destroyed.

Fifth Assignment of Error.

That the requisition papers do not show that the defendant is substantially charged with crime because the crimes are alleged to have been committed in 1895 and 1901 respectively, while the certificate of the Clerk of Court, which accompanied the papers, stated that the indictment was filed in court on the second Monday of February, 1892. This date stated in the certificate is clearly a clerical error and was intended for the second Monday of February, 1902.

The indictment on its face shows that it was found at the sitting of the Superior Court for the County of Middlesex on the second Monday of February, 1902.

The requisition of the Governor of Massachusetts shows that this, as well as the other papers, is authentic and duly authenticated.

The certificate of the District Attorney (p. 11) states that the indictment was not found by the Grand Jury until the February sitting of the Superior Court in the year 1902.

It also appears from the decision of the Supreme Court of New Hampshire (p. 22) that it was a clerical error, and that the error was cured by an amendment of the Clerk's certificate in the Court of New Hampshire.

The court says:

"The evidently clerical error in the affidavit of the clerk of the court, that the indictment was returned 'on the second Monday of February, A. D. 1892,' did not preclude a finding by the governor that the true date was the second Monday of February, 1902. The caption of the indictment, as well as the affidavit of the district attorney, fully authorized that conclusion, which is placed beyond peradventure by an amendment of the clerk's affidavit in this court.

The objection urged on this ground is a refinement of technical reasoning, which has nothing to commend it in the modern administration of justice in criminal cases."

SIXTH ASSIGNMENT OF ERROR.

That the defendant Munsey was illegally restrained of her liberty and entitled to be discharged, and that there was error in law rendering judgment against her.

This assignment seems to raise no question other than those that have heretofore been considered.

EDWIN G. EASTMAN,
GEORGE A. SANDERSON,
For Defendant.

Supreme Court of the United States.

No. 126.—October Term, 1904.

Martha S. Munsey, Plaintiff in Error, *vs.* M. Swain Clough, Sheriff of Merrimack County.	In error to the Superior Court of the State of New Hampshire.

[January 30, 1905.]

Mr. Justice Peckham delivered the opinion of the Court.

This was a proceeding on *habeas corpus* in a State court of New Hampshire to obtain the discharge of the plaintiff in error from arrest under a warrant given by the governor of that State, directing the return of the plaintiff in error to the Commonwealth of Massachusetts, as a fugitive from justice. Upon the hearing the State court refused to discharge the plaintiff in error, the order of refusal was affirmed by the Supreme Court, and she has brought the case here for review. (On a former proceeding in Supreme Court, see 71 N. H. 594.)

The proceedings before the governor of New Hampshire to obtain the warrant of arrest were taken under section 5278 of the Revised Statutes of the United States, re-enacting the statute approved February 12, 1793, (1 Stat. 302; 3 U. S. Comp. Stat. page 3597,) relating to the arrest of persons as fugitives from justice, under clause 2 of section 2 of article 4 of the Constitution of the United States.

The papers before the governor of New Hampshire consisted of a copy of an indictment of the plaintiff in error, found in Massachusetts on the second Monday of February, 1902; it contained three counts, and charged the plaintiff in error with uttering and publishing as true a certain forged instrument, purporting to be a will, well knowing the same to be forged. The first count alleged that the crime was committed on the 28th of February, 1895, at Cambridge, in the county of Middlesex, in the Commonwealth of Massachusetts; and it also alleged that since the commission of the offence the plaintiff had not been usually or publicly a resident in that Commonwealth.

The second count averred the uttering, &c., to have been on the 17th day of May, in the year 1895, in the same place, and the indictment had the same averment as to the non-residence of the plaintiff in error as contained in the first count.

The third count averred the uttering at the same place as that named in the other two counts, but laid the date as the 20th day of November,

1901. There was also before the governor of New Hampshire an application, dated the 26th of February, 1902, signed by George A. Sanderson, district attorney for the Northern District of Middlesex, to the governor of Massachusetts, requesting a requisition from him upon the governor of New Hampshire for the extradition of the plaintiff in error, who, as stated in the application, stood charged by indictment with the crime of uttering forged wills, committed in the county of Middlesex, (on the days stated in the indictment,) and who, to avoid prosecution, had fled from the jurisdiction of the Commonwealth and was a fugitive from justice, and was within the jurisdiction of the State of New Hampshire. It was also stated in the application that the indictment was not found by the grand jury until the February sitting of the Superior Court in the year 1902. There was also before the governor of New Hampshire a copy of what purported to be an affidavit of one Whitney, the original of which was used before the governor of Massachusetts, to obtain the requisition It is short, and is as follows:

"Commonwealth of Massachusetts, } *ss:*
Middlesex. }

"I, Jophanus H. Whitney, of Medford, in the county of Middlesex and said Commonwealth, on oath depose and say that Martha S. Munsey, who stands charged by indictment with the crime of uttering forged wills, as is more fully set forth in the papers hereto annexed, has fled from the limits of said Commonwealth and is a fugitive from justice. And I further depose that at the time of the commission of said crime she was in the State of Massachusetts, in the county of Middlesex of said Commonwealth, and that at the same time and previous thereto she was a resident of Cambridge in the said county of Middlesex; that she fled from said Commonwealth of Massachusetts on or about the fourth day of November, A. D. 1901; that she is not now within the limits of the Commonwealth, but, as I have reason to believe, is now in Pittsfield, in the State of New Hampshire. The grounds of my knowledge are that I have interviewed her since the fourth of November last in Pittsfield, New Hampshire, where she was living with her husband during the last week January last.

JOPHANUS H. WHITNEY."

There was also a certificate of the district attorney for the Northern District of Middlesex, that the offence charged against the plaintiff in error is a felony within that Commonwealth, and that application for the arrest and return of the fugitive had not been sooner made because the indictment was not found by the grand jury until February, 1902.

The governor of the Commonwealth of Massachusetts having given the requisition applied for, the papers above mentioned were presented to the governor of New Hampshire, and a request made that he should issue his warrant of arrest to take the plaintiff in error back to the Commonwealth of Massachusetts, as a fugitive from justice, and for the purpose of being tried on the indictment referred to. The counsel for the plaintiff in error

appeared before the governor and stated they desired a hearing before him before the warrant of arrest should be granted. This hearing was refused, and the governor then granted the warrant for the arrest and return of the plaintiff in error to the Commonwealth of Massachusetts as a fugitive from justice. In that warrant it was provided that the plaintiff in error should be afforded an opportunity to sue out a writ of *habeas corpus* before being delivered over to the authorities of Massachusetts. She availed herself of that right and sued out such writ, and upon its return the plaintiff in error made several objections to the execution of the governor's warrant, and alleged the insufficiency of the papers to authorize the granting of the same. At the close of the hearing the counsel for plaintiff in error moved that she be discharged for the reasons stated in the motion; the motion was denied, subject to the objection and exception of the plaintiff in error. The record then shows the following:

"The court thereupon ordered that the relator proceed to introduce evidence upon the question whether she was in fact a fugitive from justice. This the relator's counsel declined to do, upon the ground that such action, on their part, would constitute a waiver of their right to object to the refusal of the governor to grant a hearing upon this question of fact.

"The court then directed that the counsel for the relator state whether the relator waived the right to then, or at any future time, introduce further evidence upon this, or any question of fact, and counsel for relator declared that she did waive that right.

"No evidence was offered by the relator either upon the question whether the relator was a fugitive from justice, or upon any other question of fact, other than as above stated."

The question of the legality of the detention of the plaintiff in error is thus brought before the court. The proceedings in matters of this kind before the governor are summary in their nature. The questions before the governor, under the section of the Revised Statutes, above cited, are whether the person demanded has been substantially charged with a crime, and whether he is a fugitive from justice. The first is a question of law and the latter is a question of fact, which the governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him. Strict common law evidence is not necessary. The statute does not provide for the particular kind of evidence to be produced before him, nor how it shall be authenticated, but it must at least be evidence which is satisfactory to the mind of the governor. (*Roberts* v. *Reilly*, 116 U. S. 80, 95.) The person demanded has no constitutional right to be heard before the governor on either question, and the statute provides for none. To hold otherwise would in many cases render the constitutional provision, as well as the statute passed to carry it out, wholly useless. The governor, therefore, committed no error in refusing a hearing. The issuing of the warrant by him, with or without a recital therein that the person demanded is a fugitive from justice, must be regarded as sufficient to justify the re-

moval, until the presumption in favor of the legality and regularity of the warrant is overthrown by contrary proof in a legal proceeding to review the action of the governor. (*Roberts* v. *Reilly, supra*; *Hyatt* v. *The People*, 188 U. S. 691.)

After the decision of the governor and the issuing of the warrant the plaintiff in error sued out this writ of *habeas corpus* for the purpose of reviewing his action. The position taken by the plaintiff in error upon the hearing on the return of the writ in refusing to introduce evidence upon the question whether she was in fact a fugitive from justice left the case for decision upon the papers before the governor upon which he acted in issuing the warrant of arrest. We have no doubt that a *prima facie* case was made out, and as the plaintiff in error waived any right to give further evidence, she is concluded by that *prima facie* case. The indictment undoubtedly set forth a substantial charge against the plaintiff in error, and the facts therein set forth constituted a felony in the Commonwealth of Massachusetts, as certified by the district attorney. The sufficiency of the indictment, as a matter of technical pleading, will not be inquired into on *habeas corpus*. (*Ex parte Reggel*, 114 U. S. 642; *Pearce* v. *Texas*, 155 U. S. 311; *Ex parte Hart*, 59 Fed. Rep. 894.)

If the indictment be for three distinct offences (although of the same nature) set out in the three different counts, as is argued by plaintiff in error, it will not be presumed that such an indictment is void under the laws of Massachusetts, and the question of procedure under the indictment is one for the courts of the State where it was found. The courts of that State would undoubtedly protect her in the enjoyment of all her constitutional rights. These are matters for the trial court of the demanding State, and are not to be inquired of on this writ. If it appear that the indictment substantially charges an offence for which the person may be returned to the State for trial, it is enough for this proceeding.

Upon the question of fact, whether the plaintiff was a fugitive from justice, her counsel, in the argument before this court, set up several objections of a technical nature, which, he argued, showed that the plaintiff in error was not present in Massachusetts at the time when one of the crimes, at least, was alleged to have been committed. As the indictment sets up in the first two counts that the plaintiff in error had not been usually or publicly a resident of Massachusetts at any time since the commission of the offence set forth in those counts, it is argued that the indictment shows that she was not present in the State at the time when the third count charges a crime to have been committed, and the Whitney affidavit shows she fled from the State before the alleged commission of the crime set forth in the third count. There is no impossibility in the plaintiff in error having returned and been present in the State at the time of the alleged commission of the offence set forth in the third count, even though she had not been

"usually or publicly a resident of that State" since the time when it is alleged that she committed the offences set forth in the first two counts, and had fled therefrom before the commission of the last offence set forth in the third count. The affidavit of Mr. Whitney is to the effect that at the time of the commission of the crimes she was in the State of Massachusetts, and that at the same time and previous thereto she was a resident of Cambridge, in the county of Middlesex. Whether she was a resident or not is not important, as to the third count, if she were present in the State and committed the crime therein. The statement in the affidavit that she fled on *or about* the 4th day of November, 1901, while the third count of the indictment avers the commission of the crime on the 20th of November of that year, is sufficiently exact, considering the facts in the case, as the affiant states, that she was in the Commonwealth at the time of the commission of the crime. Reasonably construed, the affidavit of Whitney shows the presence of the plaintiff in error in the State, and is sufficient, unexplained and uncontradicted, for that purpose.

When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding State when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding State, then the court will discharge the defendant. (*Hyatt* v. *The People &c.*, 188 U. S. 691, affirming the judgment of the New York Court of Appeals, 172 N. Y. 176.) But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as *habeas corpus* is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused. As a *prima facie* case existed for the return of the plaintiff in error, and she refused to give any evidence upon the return of the writ which she had herself sued out, other than the papers before the governor, no case was made out for her discharge, and the judgment of the Supreme Court of New Hampshire refusing to grant it must, therefore, be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.